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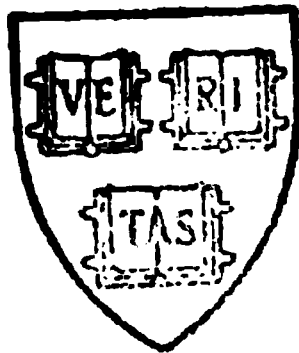
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REPORTS
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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES CITED
AND AN INDEX.

BY JAMES B. BLACK,
OFFICIAL REPORTER.

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***Chief Justice at the November Term, 1874.**

†Chief Justice at the May Term, 1875.

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ADDITIONAL RULE OF THE SUPREME COURT.

RULE 36 (*Adopted October 13th, 1875*).—When it shall be discovered, or when objection shall be made, after a cause has been submitted, that the transcript is not legally certified, or that the clerk has not affixed his seal thereto, the appeal will not be dismissed for such reason, unless the appellant shall fail to remedy the defect within such reasonable time as the court may fix, according to 2 G. & H. 278, sec. 581, of which time he shall have notice from the clerk of this court.

For previous decisions of the Supreme Court of this State overruled, see INDEX, tit. CASES OVERRULED.

Gavin & Hord's Statutes of Indiana cited as 1, 2 G. & H. Statutes of Indiana, Vol. 3 (Davis' Supplement), cited as 3 Ind. Stat.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1874, IN THE FIFTY-NINTH YEAR OF THE STATE.

PETTY ET AL. v. MYERS, TREASURER, ET AL.

CONSTITUTIONAL LAW.—*Legislative Power.*—*Appropriation of Aid, by Counties and Townships, to Construction of Railroads.*—The statute authorizing aid to the construction of railroads by counties and townships taking stock in, and making donations to, railroad companies (3 Ind. Stat. 389) is constitutional. BIDDLE, J., dissented, on the grounds, 1. That the taking effect of the law is made to depend on a majority of the local vote of a county or township; 2. That the act is local and special; 3. That the act takes the private property of the citizen against his consent, without the consent of his representative, and without compensation; 4. That the tax authorized by the act is not equal and uniform; 5. That the State can not tax particular localities to build a railroad owned as private property.

APPROPRIATION OF AID TO CONSTRUCTION OF RAILROAD.—*Petition for.*—*Order of Board of Commissioners for Vote on.*—*Where Expended.*—*Mode of Need not be Stated.*—*Construction of Railroad.*—*Tax.*—Upon the petition of freeholders of a township to the board of county commissioners, setting forth that a certain railroad company was duly organized, that the line of the railroad of the company ran through the township, and the construction of the railroad would be of great benefit to the township, and praying an appropriation of a certain sum of money, not exceeding two per cent. of the taxable property of the township, to aid in the construction of the railroad, the said board ordered an election for the purpose of taking

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156	166

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166	182
166	186
166	192

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the votes of the legal voters of the township upon the subject of appropriating said sum by said township to aid in the construction of said railroad; and, upon the election, so ordered, resulting in favor of the appropriation, the board, at the session at which it determined the amount to be charged for county purposes for the year 1873, ordered that a tax be levied, of a certain per cent., to be collected on all the taxable property of the township, in all respects as other taxes are collected for state and county purposes.

Held, that the intention being manifest to raise the money before the subscription or donation should be made, the action of the board was not in violation of sec. 6, article 10, of the constitution, prohibiting subscriptions unless the same be paid for at the time.

Held, also, that it sufficiently appeared by the petition that the aid was to be given for the construction of the railroad in that township. *Query*, whether money given by a township in aid of the construction of a railroad must be expended upon that part of the road lying in that township.

Held, also, that, although the road was already constructed through the township and the cars were running thereon, if the road was not thoroughly ballasted, and it did not appear that the full amount of aid proposed was not required to complete the road through the township, the question was not raised whether or not the aid was authorized for the construction of the road in the township.

Held, also, that the prayer of the petition was in conformity with the statute requiring the vote "to be taken upon the subject of appropriating money by such county or by such township for the purpose of aiding in the construction of such railroad as prayed for in said petition;" and that the mode of the appropriation of the money, by subscription or by donation, need not be specified in the petition or the order of the board, or be submitted to the vote.

Held, also, that the intention was sufficiently expressed to levy the tax for the year 1873.

SAME.—*Payment of Amount of Tax to Company After it has been Enjoined.*—Where the collection of a tax levied in a township in aid of the construction of a railroad had been enjoined, some of the persons taxed having voluntarily paid to the railroad company the amount assessed against them, and taken from the company stipulations that they should be released from an equal amount that might thereafter be levied against them;

Held, that a tax thereafter levied upon new proceedings was not thereby vitiated as against persons who did not so pay to the company; and that the company had no legal right to the money thus paid, as the stock had not been subscribed for or the donation made.

From the Miami Circuit Court.

H. J. Shirk and *J. Mitchell*, for appellants.

J. S. Collins and *N. O. Ross*, for appellees.

WORDEN, J.—On July 9th, 1872, a petition signed by over

twenty-five freeholders of the township of Richland, in the county of Miami, was filed with the board of commissioners of that county, setting forth that the Detroit, Eel River, and Illinois Railroad Company was a duly organized company under the laws of this State, and that the line of the railroad of said company ran through that township, and that the construction thereof would be of great benefit to that township, praying that the township might make an appropriation of the sum of ten thousand five hundred dollars to aid in the construction thereof, said amount not exceeding two per centum upon the amount of taxable property of said township, as shown on the tax duplicate, etc., and praying that the board take the necessary steps for that purpose, etc.

The board thereupon, having taken the petition under advisement, ordered an election, "for the purpose of taking the votes of the legal voters of the said township upon the subject of appropriating ten thousand five hundred dollars of money by said township," to aid the said railroad company in the construction of the railroad of the company as prayed for in the petition.

The election was accordingly held, due notice thereof having been given, and resulted in a majority of fifty in favor of the appropriation.

The board of commissioners, on June 11th, 1873, made an order, which, after reciting the previous proceedings in that behalf, is as follows:

"It is therefore ordered that a tax of seventy one hundredths of one per cent. be and the same is hereby levied and ordered to be collected upon all the real and personal property in said township of Richland liable to taxation for state and county purposes, and that said tax shall be collected in all respects as other taxes are collected for state and county purposes."

The tax was accordingly placed upon the tax duplicate of the county for the year 1873, by the auditor of the county, for collection.

This action was brought by the appellants, who were taxpayers of Richland township, against the auditor and treasurer

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of the county and the railroad company, to enjoin the collection of the tax. The railroad company filed an answer to the complaint, to which the plaintiffs demurred for want of sufficient facts, but the demurrer was overruled, and the plaintiffs excepted. The plaintiffs declining to reply or plead further, final judgment was rendered for the defendants.

The pleadings in the cause are lengthy, and need not be set out in order to an understanding of the questions involved. It is objected, first, that the statute authorizing aid to railroads by donations and taking stock by counties and townships, etc., (3 Ind. Stat. 389) is unconstitutional and void. The constitutionality of this statute was so fully considered by this court in the case of *The Lafayette, Muncie, and Bloomington R. R. Co. v. Geiger*, 34 Ind. 185, followed by that of *John v. The Cincinnati, Richmond, and Fort Wayne R. R. Co.*, 35 Ind. 539, and some subsequent cases, that the question can not be considered an open one in this State. We shall not, therefore, enter upon a re-examination of the question. We may observe, however, that since the cases in 34 and 35 Ind. were decided, the question has been again before the Supreme Court of Iowa, and their former ruling sustaining such legislation, in the case of *Stewart v. The Board of Supervisors of Polk Co.*, 30 Iowa, 9, followed. *Jordon v. Hayne*, 36 Iowa, 9. Since that time, also, the question has been elaborately considered by the Supreme Court of Kansas, and the constitutionality of similar legislation upheld. *Leavenworth County v. Miller*, 7 Kan. 479. Like decisions have also been since made by the Supreme Court of the United States. *Railroad Company v. County of Otse*, 16 Wal. 667; *Olcott v. The Supervisors*, 16 Wal. 678; *Township of Pine Grove v. Talcott*, 19 Wal. 666.

In the case of *John v. The Cincinnati, Richmond, and Fort Wayne R. R. Co.*, *supra*, this court stated briefly the ground on which it was supposed that the legislation must be upheld. For the purpose of showing a similarity of views entertained by the Supreme Court of the United States, as well as that the question should be regarded as settled, we make the following extract from the opinion of the court in

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the case of *Railroad Company v. County of Otæ, supra*: "No one," says the court, "questions that the establishment and maintenance of highways, and the opening facilities for access to markets, are within the province of every state legislature upon which has been conferred general legislative power. These things are necessarily done by law. The state may establish highways or avenues to markets by its own direct action, or it may empower or direct one of its municipal divisions to establish them, or to assist in their construction. Indeed, it has been by such action that most of the highways of the country have come into existence. They owe their being either to some general enactment of a state legislature or to some law that authorized a municipal division of the state to construct and maintain them at its own expense. They are the creatures of law, whether they are common county or township roads, or turnpikes, or canals, or railways. And that authority given to a municipal corporation to aid in the construction of a turnpike, canal, or railroad is a legitimate exercise of legislative power, unless the power be expressly denied, is not only plain in reason, but it is established by a number and weight of authorities beyond what can be adduced in support of almost any other legal proposition. The highest courts of the states have affirmed it in nearly a hundred decisions, and this court has asserted the same doctrine nearly a score of times. It is no longer open to debate."

The provision of sec. 6 of the tenth article of the constitution, that "no county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription," if held applicable to townships, has not been violated in this instance, as here it was intended to raise the money before the subscription or donation should be made.

The second objection to the tax is, that it does not appear, from the petition and proceedings, that the aid was asked, or was to be given, for the construction of the road in that (Richland) township. It does appear, however, that the road was to run through that township, and the aid was to be given for its construction. As at present advised, we are not inclined

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to the opinion that when aid is given by a county or township for the construction of a railroad running through the same, the money must necessarily be expended upon that part of the road lying in the county or township. But this point need not be, and is not, decided. If the money must be applied in the county or township, and if, in this case, after the township shall have made her subscription or donation, the company shall attempt to apply the money elsewhere, she can be enjoined from so doing and compelled to make a proper application. There is no force in this objection.

It is objected, in the third place, that as the "road was already constructed through Richland township, and the cars running thereon, the law does not authorize aid to be voted it by the township." Here, again, we need not determine whether, if the road had been entirely completed through the township, the aid could have been voted. It appears from the pleadings that while the road was so far constructed as to enable the company to run trains regularly across the township, it was not thoroughly ballasted, and has been needing and receiving ballasting since. For aught that appears, it may have required the full amount of aid proposed to be furnished by the township to fully complete the road through that township. This objection is without foundation.

It is objected, fourthly, that "the levy of the tax is void because the petition does not specify whether the aid shall be by a subscription to the capital stock, or by a donation." The petition in this respect is in conformity with the statute. By the statute, the vote is "to be taken upon the subject of appropriating money, by such county or by such township, for the purpose of aiding in the construction of such railroad, as prayed for in said petition." By the terms of the statute, it is not required that the mode of making the appropriation, whether by subscription or donation, shall be submitted to vote. The mode is to be determined upon afterward. Some members of the court are of the opinion that if the question of appropriation, and also the mode of making it, had been submitted to vote, and the tax levied in pursuance of it, the

proceedings would have been valid. But all are agreed that the proceedings in this case were in accordance with the statute and valid. See *The State, ex rel. Scobey, v. Wheadon*, 39 Ind. 520.

We proceed to the fifth objection, which is, that "the levy of the tax is void, because the order of the board of commissioners does not specify for what year it is made, and further, does not specify the purpose to which the tax is to be applied." This objection is without foundation. The order of the board, which has been heretofore set out in this opinion, is preceded by a recital of the previous proceedings, and, although it does not, in terms, specify the object and purpose of the tax thus ordered to be levied and collected, there can be no mistake or misapprehension as to the purpose. It was not necessary in that order to specify whether the aid should be by way of subscription or donation. When the money is raised and ready to be applied, it will be time to determine that question. As the levy was ordered at the session of the board when they determined the amount to be charged for county purposes for the year 1873, and as it was ordered that the tax be collected in all respects as other taxes are collected for state and county purposes, we think it was intended that this tax should be levied and collected for that year.

This brings us to the sixth and last objection made to the tax. There had been a previous tax assessed in that township on a vote taken to furnish aid to the same railroad company, the collection of which had been enjoined by the judgment of the proper court, the judgment remaining in force. But some of the persons thus previously assessed had voluntarily paid the amount assessed against them, although the collection had been enjoined, to the railroad company, and had taken from the company stipulations that the parties thus paying should be released from the payment of an equal amount that might thereafter be levied against them respectively, to aid in the construction of the road. This, it is claimed, vitiates the entire tax. We are, however, of a different opinion. The railroad company had no legal right to the

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money or control over it, the stock not being subscribed for, nor the money paid to them by way of donation. *The Board of Comm'rs of Crawford Co. v. The Louisville, etc., R. W. Co.*, 39 Ind. 192; *Sankey v. The Terre Haute, etc., R. R. Co.*, 42 Ind. 402. Perhaps such payments and stipulations between the railroad company and the tax-payers would not have the effect of releasing the latter from the payment of the full amount of taxes that might be subsequently assessed against them for aid to the same railroad. If they would not, then it is clear that such payments on the one hand, and stipulations on the other, cannot vitiate the tax. But the question here is not whether the parties who thus paid on the former assessment can be released to the extent of the payments thus made. There is nothing to show but that the stipulations of the railroad company can and will be carried out. The arrangement, if carried out, will work equality and justice, and will wrong no one. Those who thus paid will have paid somewhat in advance of their more unwilling neighbors, and perhaps more than their relative share of the burthen; but those who did not pay were not injured by, and have no right to complain of, this.

We have thus considered all the questions made in the cause, and find no error in the record.

The judgment below is affirmed, with costs.

BIDDLE, J.—I cannot concur in this opinion. The act is unconstitutional.

1. The taking effect of the law is made to depend on a majority of the local vote in the county or township.

The constitution declares, that “no law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution.” Sec. 25, art. 1.

There is no authority provided in the constitution that a local majority shall give effect to a law; but it expressly declares, that “the legislative authority of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.” Sec. 1, art. 4.

No legislative power, only the elective power, is retained in the voter. It is granted to the General Assembly, the members of which are elected for that particular purpose. They take an oath to support the constitution, and are responsible over to their constituencies. They are not allowed to subserve their private interests. By the act in question, the voter exercises a legislative power, when he is not elected for that purpose, takes no oath, is not responsible to any one, and is not the representative of any one but himself. He votes, and has the right to vote, according to his private interests; and thus he gives effect to a law which taxes the minority of voters against their consent, and without the consent of their representatives. Rights cannot be thus taken away, or impaired. Franchises, offices, privileges, may be granted or denied by majorities, but rights cannot be invaded by that means. Favors may be granted, but not by taking away the rights of others. It is the first and highest duty of a government to protect the rights of minorities. No vested right must be disturbed by fancied notions of policy or expediency. It is fixed by law. This act is not a law; it is no more than a proposition to become a law.

2. The act is both local and special.

The constitution declares, that "the General Assembly shall not pass local or special laws, in any of the following enumerated cases." Sec. 22, art. 4. And amongst which enumerated cases is the following: "For the assessment and collection of taxes for state, county, township, or road purposes."

The tax in question is for road purposes, and directly against the constitution. By this act we have a patch-work of local and special laws, depending for their effect upon local and fluctuating majorities, instead of a system of general and uniform laws, depending upon the authority of the General Assembly. The act is a dead letter until it receives life from a majority of votes. On the face of it, a court cannot tell when or where it is in force, or whether in force at all. A rule of action which a court cannot know, without first hav-

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ing a fact proved, is not a law. And by this act powers are granted to counties and townships which cannot be exercised by the General Assembly itself. No one for a moment will contend that the legislature could constitutionally pass a local and special law, making the assessment and collection of taxes for state, county, township, or road purposes, depend for its taking effect upon a local majority of a county or township; yet this decision allows it to be done for the benefit of a railroad, which is held as private property. If it cannot be done for a public highway, much less can it be done for a private railroad. There is no analogy between a public highway and a railroad, except that they are both alike means of passage. A public highway is created by law, and abolished by law. The railroad to which this aid is sought to be given is not created by law. Simply the right to build it is granted by law. It cannot be abolished by law, nor can its abolishment be prevented by law. It may roll away its stock, carry off the aid granted to it, take up its rails, and abandon its way, and thus abolish itself in spite of law.

The easement in a highway is in the public; the right of way in a railroad is private. All persons have a right to travel on a public highway, at all times of the day and night, without payment; no person can travel on a railroad at any time without payment, and then only at such hours as the railroad company pleases to go and come. A highway is open and free to all by law; a railroad is operated by private directors, and under the control of its owners. The property in a railroad differs in no respect from other private property, except that the law has a right to regulate its use as a common carrier. That railroads are great and noble enterprises, is true; but the legislature has no more constitutional power to give them aid by a special and local act, dependent for its taking effect upon a local majority, than it has, in a similar manner, to give like aid to a turnpike road, or to a line of steamboats, canal packets, or stage coaches, owned by private companies.

3. The act takes the private property of the citizen against

his consent, without the consent of his representative, and without compensation.

The constitution declares, that "no man's property shall be taken by law without just compensation, nor except in case of the State, without such compensation first assessed and tendered."

In this case, it is absurd to say that the floating speculative benefit to the tax-payer, from the contiguity of the railroad, is "such compensation," within the meaning of the constitution; it means the constitutional standard, and it is idle to contend that it was "first assessed and tendered." Taking a special tax by a local majority for a private use, is taking property without law, and against the constitution. A railroad cannot take the land on which its track is laid "without compensation first assessed and tendered," nor can the legislature grant it such a power. How then can it grant the power to assess and collect a tax to aid in building a railroad, when it cannot grant the right to take even the foundation?

An act to compel the owner to grant the right of way over his land to a railroad, by a majority vote of the county or township, would scarcely be above ridicule; yet such an act is not a whit different in principle from the one under consideration; and money in the citizen's pocket was intended to be, and ought to be, as well guarded from unconstitutional touch as the land in his deed.

There is no power in a government so secret and insidious, and so tempting to exercise, as the power of taxation. It takes various disguises to gain its ends, and none more deceptive than that of public enterprise; and, when exercised discreetly, no human means have yet been devised to make its burdens completely equal and just. No power, therefore, should be more carefully watched and closely guarded.

It is a trite remark, that taxation and representation should go together, and its triteness proves its truth. Only those who pay the tax should have a right to vote it.

Judge COOLEY, in his work on Constitutional Limitations, says: "Taxes can only be voted by the people's representatives.

They are, in every instance, an appropriation by the people to the government, which the latter is to expend in furnishing the people protection, security, and such facilities for enjoyment as it properly pertains to government to provide. This principle is a chief corner-stone of Anglo-Saxon liberty ; and it has operated not only as an important check on government, in preventing extravagant expenditures, as well as unjust and tyrannical action, but it has been an important guaranty of the right of private property."

4. The tax is not equal and uniform.

The constitution declares : " The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation." By this act aid may be granted to one railroad in a county or township, and denied to another equally meritorious ; and by this tax one railroad may be compelled to aid in building another—its rival. Would any one contend that a county can assess and collect a tax applicable to one county road, and not to another in the same county ? How, then, can it assess and collect a tax to aid one railroad, and not another in the same county ? The plain answer is, that it can do neither. Such a system of taxation is neither uniform nor equal, but simply irregular and unjust.

5. I do not deny that a state may build, own, and operate a railroad, and assess and collect a uniform and equal tax, by a general law for that purpose ; but a state cannot tax particular counties or townships even to build its own railroad ; much less, then, can it delegate the legislative power to a county or township to assess and collect a tax in aid of a railroad owned as private property ; and, still worse, to make the act take effect upon the contingency of a popular majority.

I do not distinguish between a tax to aid a railroad by donation, and a tax to purchase stock in a railroad for a county or township, when the act is made to take effect on a majority vote. No law can be thus enacted constitutionally to compel the citizen to contribute his money under the form of a tax to aid in building a railroad, nor to enable a county or township to take stock in a railroad. Both are alike invasions of his

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vested right to securely hold and exercise a discretionary dominion over his property, subject only to constitutional burdens.

In the exercise of all granted and discretionary powers, and in all questions of expediency or policy, and where there is doubt, the judicial department of a state should yield to the legislative ; but where powers are expressly denied, as in this case, there can be no question of discretion, expediency, or policy, and no doubt as to judicial duty.

I am aware of the decisions which go in support of the opinion of a majority of the court in this case ; but, as I think, they are sustained by specious, artificial, and unsound reasoning, and they have not yet become fixed law. Besides, there are several very forcible decisions against it. The question is yet in a transitional state. It is not too late to settle it on a solid constitutional basis.

While it is the duty of a court to carefully interpret and apply the constitution, it must not, under any circumstances, allow it to be overthrown or destroyed ; and, in the opinion of this minority of the court, no line of decisions, however numerous and respectable, that grant a power which is expressly denied by the constitution, ought to be upheld.

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COUNTY TREASURER.—Fees.—Statute Construed.—During the war of the rebellion, the county of Fountain issued county orders to a large amount to pay bounties to volunteers for the army of the United States, all of which were afterward paid out of funds raised by taxation. The treasurer demanded two and one-half per cent. on the orders so paid, under sec. 1 of the act of June 4th, 1861, 3 Ind. Stat. 247.

Held, that as the money with which said orders were paid was the product of taxation, the treasurer was not entitled to any commission for paying

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it out. His compensation was limited to five cents for each order redeemed by him.

From the Marion Civil Circuit Court.

D. Turpie, H. D. Pierce, J. W. Harper, and S. J. Woods,
for appellant.

Tipton & Miller, for appellee.

BUSKIRK, C. J.—King, the appellant, as it appears from the evidence, was, on the 12th day of October, 1862, elected treasurer of Fountain county, and served as such until the 25th day of August, 1867. During the term of his office, he received and disbursed as treasurer the sum of two hundred and fifty thousand eight hundred and forty dollars and fifty-four cents, on account of a fund called the County Volunteer Fund of said county, being moneys appropriated by the board of commissioners in aid of volunteering for the army of the United States, during the war of the rebellion.

The case was tried before the Hon. Judge Howland, of the Marion Circuit Court, and a finding and judgment rendered for the defendant. A motion for a new trial was made, for the reason that the finding was contrary to law and the evidence. The motion for a new trial was overruled, to which ruling the appellant at the time excepted.

The error assigned calls in question the action of the court in overruling the motion for a new trial.

The only question involved in this case is the construction to be given to the ninth clause of the first section of the act of June 4th, 1861, prescribing the fees of county treasurers and other officers. The clause of the act referred to reads as follows: "County treasurer's fees: Two and one-half per cent. on all moneys received and paid out other than tax and school funds: Provided, however, that no percentage whatever shall be allowed the treasurer for money paid out on the redemption of county orders, but the treasurer shall be allowed five cents for each order redeemed and registered by him." 3 Ind. Stat. 247.

The above act was in force during the appellant's incumbency

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of the office, and it is conceded that if he recover at all it must be by force of the section cited.

The testimony of the appellant and David Webb, county auditor, will fully explain the nature and character of the county orders redeemed, and the services rendered by the appellant.

Mr. King, the appellant, testified as follows: "I had nothing to do with the draft fund as treasurer of the county, except to redeem the orders when presented, except the sum of about thirteen thousand dollars paid into the treasury by citizens of Davis township; this money I think I receipted for as treasurer; paid it out on order of the auditor; I retained two and one-half per cent. for receiving and disbursing the same; no other moneys came into my hands from any source on account of said bonds, except as I collected the same from tax duplicate of the county. All moneys paid out by me in redemption of said bonds or orders came from the tax duplicate of the county; I did not negotiate any of the orders, and none were sold by me; the only thing I had to do was to redeem the same. For all moneys disbursed by me in payment of said bonds or orders, I received the per cent. allowed by law for collection of same as tax, and on each of said bonds or orders redeemed by me, I received the sum of five cents, as the fee allowed by law for each order redeemed and registered by me. There were no funds placed in my hands to redeem said orders, by the commissioners, other than what came from tax on the duplicate."

David Webb, witness for the defendant, testified as follows: "I was auditor of Fountain county, Indiana, from 1864 to 1867, inclusive; during this time all of what is known as the bounty orders were issued; I, as auditor, issued warrants or orders on the county treasury to such persons as were entitled to them, in pursuance of the order of the board of commissioners; all of the warrants or orders issued by me, as auditor, were delivered to the parties entitled to them, or to certain individuals who were designated by the board of commissioners as agents to receive the orders and deliver them to the proper persons

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entitled to have them ; none of these orders were delivered to James W. King, as treasurer of the county, to be negotiated or to be delivered to other parties ; James W. King, as treasurer, had nothing to do with the orders, except to redeem the same out of the county treasury when they were presented for payment, if money was on hand therefor ; all of the orders redeemed by Mr. King, as treasurer, were redeemed in the payment of taxes, and with moneys derived from the collection of taxes, assessed on the tax duplicate of the county for that purpose, which money was collected in the usual way of collecting the county revenue ; the bounty warrants or orders were issued in the ordinary form of county orders or warrants, except they were made payable at a future date, and were drawn with interest from date ; they also had printed on them the designating words, ‘ expenses of volunteers.’ ” One of which orders was given in evidence, and read as follows :

" 25.00. EXPENSES OF VOLUNTEERS. No. 1,301.

“ AUDITOR’S OFFICE, COVINGTON, IND.,
“ February 20th, 1866. }

“Treasurer of Fountain County, Indiana, pay to Jasper Hayden, or bearer, on or before March 25th, 1867, with interest from November 7th, 1864, twenty-five dollars and ——— cents, for amount paid for enlisting volunteers on quota of Richland township, as allowed by the board of commissioners of said county, at their special session, October 10th, 1864.

"DAVID WEBB,

"Auditor of Fountain County."

The question presented is one of first impression. There has been no judicial construction of the clause of the statute in question. The positions assumed by counsel will appear from the following extracts from their briefs.

Counsel for appellant say: "It is very clear, under this clause, that there are certain moneys, upon the receipt and disbursement of which the treasurer is entitled to two and a half per cent. commission. What are those moneys? This

question is answered by the words of the clause following the particle 'other.'

"He is entitled to two and a half per cent. commission upon all moneys 'received and paid out,' except tax and school funds. The commission is earned by the receipt and payment out of all moneys other than tax and school funds. The commission is not earned by the receipt of such moneys as come within the exceptional clause; it is not earned by the paying out of any such moneys, but by the two acts of receipt and disbursement. The treasurer is entitled to the commissions; consequently, to deprive the treasurer of these commissions, it is manifest that the moneys upon which he claims these commissions must not only be received as taxes or school fund, but paid out as taxes or school fund.

"'Two and one-half per cent. on all moneys received and paid out, other than tax and school funds,' is the precise language of the statute. Much the largest portion of every county treasurer's funds, in fact the whole of it, is received as taxes or school fund.

"The amount chargeable upon the current and delinquent duplicate makes up the whole ordinary county revenue, and this amount is received as taxes, and for the most part paid out as taxes, to the state, county, and township officers. And so with regard to the special revenue of the county upon interest, trust funds, sale of school lands, show licenses, etc. Those special funds are received altogether as school funds, and usually paid out as school funds to the proper officers. But occasionally moneys are received by a county treasurer as taxes or as school funds, but are not paid out as such, but go to a private person, a creditor of the county. In such an instance, we think it is clear that the money, though it is received as tax or school fund, is not paid out as such, and comes clearly within the provision of the clause above cited, being money received and paid out other than tax and school fund. If this be not the meaning of the clause, what purpose has it at all?

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"All moneys go into the treasury as taxes or school funds, but all money is not paid out as tax or school funds, although a very great portion of it is.

"The money paid to the state treasurer, to the township trustees, to the supervisors of roads, etc., is money paid out as tax; it is received and paid out as tax, and of course the treasurer is not entitled to the two and a half per cent. commission provided for in this clause; but money paid out to the holder of one of these military warrants in Fountain county is not paid out as taxes; it is paid out as a debt due a creditor of the county, and although it may have been received as taxes, yet not having been paid out as such, the treasurer is clearly entitled, under the clause cited, to the two and a half per cent. commission. What could be the purpose of the legislature in providing that two and a half per cent. commission should be allowed upon certain moneys for the receipt and disbursement of the same, if, as contended on the other side, all the moneys, every dollar that comes into the treasury, is included in the excepting clause? There is not a dollar in the county treasury which is not either received or paid out as taxes and school funds; but it sometimes happens, though not often, that, as in the case at bar, a considerable amount of money may be received as taxes or school funds, but not paid out as such; and in such cases the commissions are allowed of two and a half per cent. The whole controversy may be summed up in one brief question: What preceding phrase of the clause do the words, 'other than tax and school funds,' qualify? Do they qualify merely the phrase 'paid out?' If so, then the treasurer would be entitled to two and a half per cent. upon all moneys expended, except those paid as tax quotas to state, county, and township officers. Do they qualify the word 'received,' only? Then the clause is meaningless, because the county gets no moneys except as taxes and school funds, and the provision is an absurdity. The words, 'other than tax and school funds,' referred to, undoubtedly qualify the whole phrase, 'on all moneys received and paid out.' This makes the provision sen-

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sible, reasonable, and just, and is the only construction which has that effect."

Again, it is said: "The appellant in this case, King, received and paid out moneys, 'other than tax and school funds,' to the amount of two hundred and fifty thousand eight hundred and forty dollars and fifty-four cents. The evidence is, that he received and paid out the money; of course he paid it on county orders or warrants, or bonds, whatever they may be called; he could pay it out no other way. But he paid these orders. He did not redeem them. There is no evidence that a single one of these orders was ever redeemed. They were all paid, to the amount of two hundred and fifty thousand eight hundred and forty dollars and fifty-four cents, by the appellant. They were never presented for protest or acceptance. There was no occasion for their being so presented. They bore interest on their face from date. They were payable at a future day named in them. They were paid, with interest, by the appellant, but they never were redeemed by him. This appellant has not sued the county for any fees due him for the redemption of county orders. He has sued the county for the receipt and disbursement of the military loan fund."

Counsel for appellee argue as follows: "It is clear that there are two classes of money exempted from the two and one-half per cent. commission, by the clause above recited, which are tax and school fund. It is not claimed by counsel for appellant that a treasurer is entitled to the two and one-half per cent. for receiving and paying out funds of either of these classes; then it is equally plain that if the moneys received and paid out by appellant, as claimed in his complaint, was either tax or school fund, he cannot recover in this action.

"What is meant by the terms, 'tax' and 'school funds,' as used in the statutes?

"There can be no difficulty in determining what school funds mean. Any moneys set apart by law, derived from any source whatever, for the support of schools, are embraced by the terms

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‘school funds.’ The term tax, or taxes, is defined by Webster to be ‘a charge, especially a pecuniary burden which is imposed by authority, as a levy of any kind made upon property, for the support of a government.’

“From this definition, it is plain, that all moneys that come into the custody of the county treasurer from collections made by him from the levy on the tax duplicate are taxes within the meaning of the statute, and therefore are excepted by the statute from the two and one-half per cent. commission.

“If there could be any doubt of the correctness of this view of the law, such doubt would be expelled in a moment when we consider the proviso appended to the clause. The legislature, not intending that there should be any pretext for a different construction of the clause than its language would fairly import, appended a proviso as follows: ‘Provided, that no percentage whatever shall be allowed the treasurer for money paid out on the redemption of county orders, but the treasurer shall be allowed five cents for each order redeemed and registered by him.’

“The legislature undoubtedly intended by the proviso to limit the fees of county treasurers for redeeming or paying off county orders presented for payment, to the five cents per order as their sole compensation for that service; or, if not, why the necessity for the proviso? By the act of June 4th, 1861, which was the law during the period that appellant was treasurer of Fountain county, there is no per cent. whatever allowed the treasurer for paying out moneys that came into his hands from the tax duplicate. Treasurers are paid a per cent. for the collection, and that is their sole compensation, unless they pay the money out again, and if they do, they receive five cents for each county order paid off by them. There is no way to draw money lawfully from a county treasurer except on what is known as a county order, and it is expressly provided by the law, that treasurers shall receive no per cent. for paying off such orders, and are expressly limited to the five cents per order for compensation.

“Counsel for appellant argue that there is a difference between

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the words 'redeemed,' or 'redemption,' and 'payment,' and, in fact, rest the whole of appellant's right of recovery on the supposed difference in the words.

"We confess we are unable to see the force of the argument so earnestly made to sustain the supposed difference in the meaning of the two words.

"There can be no difference in the meaning of the two words as used in the clause of the statute. When a county order is redeemed, it is paid; and when it is paid, it is redeemed; and that is all there is of it.

"Appellant insists that a county order cannot be said to be 'redeemed' until it is first presented for payment, and endorsed 'no funds,' and afterward when taken up by the treasurer it is redeemed or bought back, and to this class of orders alone the five-cent proviso applies, but that where the treasurer is in funds, and pays an order without such indorsement, and without protest, he is entitled to the two and one-half per cent. commission.

"It is sufficient in answer to this to say, that a county transacts all her business through the medium of officers or agents, and when an order is drawn on the treasury, it is drawn by the county through her auditor, and the county, through her treasurer, redeems the order when presented, or, to use the language of appellant's counsel, 'buys back' the order; therefore the county not only issues the order and delivers the same to the party entitled to receive it, but when presented for payment the county redeems the order back again, the whole being the act of the county through her agents, the county auditor and treasurer.

"It is claimed that appellant, King, while treasurer, received and paid out moneys 'other than tax and school funds,' to the amount of two hundred and fifty thousand eight hundred and forty dollars and fifty-four cents. If this is correct, then he is entitled to two and one-half per cent. on the amount, if he has not been before paid, or his claim barred by the statute of limitations. This the appellee denies, and that is the issue in this case."

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The appellant seeks to recover a commission of two and one-half per cent. upon all moneys by him paid out in the redemption of county orders. It very clearly appears from the evidence of the appellant and Webb, the county auditor, that after the county orders were issued on account of the volunteer fund, the board of commissioners of said county levied a tax upon all the taxable property of the county, to create a fund with which to pay off and redeem such county orders; that the appellant collected such tax and received a commission for collecting the same at the rate fixed by law; that with the money so collected he paid off and redeemed such county orders, and that he received five cents for each order so redeemed. And it is now claimed that in addition to the commission for collecting the money with which he redeemed such orders, and the five cents for each order so redeemed, he is entitled to receive a commission for paying out such money, upon the ground that the money so collected and paid out is not to be regarded either as tax or school fund. It is very obvious that it did not constitute a part of the school fund; and it is equally as plain that it was collected as a tax. The levy was a general and not a special one, and when collected it constituted a part of the general fund of the county, and was paid out in the redemption of the county orders. If this was not a tax within the meaning of the statute under examination, by what authority did the appellant charge and receive a commission for collecting the same? and if he did not redeem the county orders, why did he charge and receive five cents for each order so paid off? While the appellant retains the money which he received for collecting and paying said money, he ought not to be heard to say that it was not a tax, and that he did not redeem such county orders. We think it was a tax, and that he did redeem such county orders; and it results, that he is not entitled to receive any commission for the redemption of such county orders; and this comports with the plain and express requirement of the proviso in question.

We have said that there has been no judicial construction of the ninth clause of section 1 of the act of June 4th, 1861,

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but we find that such section is very similar to the statutes of 1831, 1843, 1852, 1853, 1855, and 1865.

It was held by this court, in *Woollen v. The Board of Commissioners of Jefferson County*, 4 Ind. 331, that the treasurer was not, under the act of 1843, entitled to the specified per centum for redeeming county orders, where redeemed with the revenue collected on the tax duplicate.

The ruling in the above case was adhered to in *Snelson v. The State, etc.*, 16 Ind. 29, and the doctrine was carried further, and applied to the statute of 1852, which was held to be, in substance, the same as the statute of 1843. These cases are, in principle, the same as the present one, and are entitled to great weight and consideration.

We think the court below committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

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YOUNG ET AL. v. PICKENS ET AL.

PLEADING.—*Muniment of Title.*—Where a defendant in a partition proceeding pleads by special answer a title derived through an executor's sale, and alleges a will which forms a muniment of his title, the terms of the will and of the order of the court, directing the sale of lands by the executor, should be so stated in the answer as to enable the court to determine their legal effect, or copies of them should be filed with the answer.

WILL.—*Widow.—Election by.*—Under the statute of this State (1 G. & H. 299, sec. 41), if a provision made by will for the widow of the testator is declared to be in lieu of her right in her husband's lands, she must elect whether she will take under the will. If the will makes provision for her in lands or money, or anything else, and it is not expressed to be in lieu of her right in the lands of her husband, and it does not clearly appear by the will to have been the intention of the testator that she should have both, she must in such case elect whether she will take under the will.

From the Clay Common Pleas.

S. Turman and *J. Birch*, for appellants.

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D. E. Williamson and A. Daggy, for appellees.

DOWNEY, J.—This was an action for the partition of real estate, and there was judgment for the appellees, the defendants, in the common pleas. The errors properly assigned call in question the sufficiency of the second and third paragraphs of the answer of Pickens, and the refusal of the court, on motion of the plaintiffs, to grant a new trial. The complaint is in two paragraphs. We do not deem it necessary to set it out in full. The leading facts of the case are, that one Alexander Connely was seized in fee of the land, at his death, on the 25th day of November, 1857, and that he left a will. On the 24th day of June, 1858, the widow died. On the 20th day of February, 1860, the executor filed his petition to sell the real estate. The land was sold under this proceeding, and on the 20th day of August, in that year, conveyed to said Pickens, the purchaser. There is no question but that the title to two-thirds of the land passed by this sale to Pickens. But the plaintiffs, who are heirs of the widow, Rebecca Connely, insist that one-third of the land vested in the widow and passed, at her death, to them. The first paragraph of the complaint makes no reference to the will, nor does it state how the title of the parties is derived. The second refers to the will, and alleges an election by the widow not to take under the will, and the giving of notice of such election to the executor. The terms of the will are not stated in this paragraph of the complaint.

In the second paragraph of the answer of Pickens, it is admitted that Alexander Connely died testate, leaving said widow, etc., and it is alleged that the will was duly executed; that a copy of it is filed with the paragraph of the answer and made part thereof; that the will, after the death of the testator, was duly proved and recorded; that the sum of two hundred dollars was bequeathed to said Rebecca for her portion of the estate, and she was also to have possession of certain lands, which the executor was to purchase for certain minors named in the will, during her lifetime. It is then alleged that she accepted and received the two hundred dollars allowed her

by the will, and receipted to the executor therefor, etc. ; wherefore the defendant says she is not entitled to any part of said land.

In the third paragraph, it is alleged that the executor of the decedent filed his petition in court asking an order to sell said real estate in pursuance of the terms of said will, and afterward the court duly ordered said executor to sell said land ; and the defendant Samuel Pickens purchased all of said land of said executor so sold under an order of the common pleas of said county. It is alleged that a copy of the proceeding in the sale is made part of the paragraph and filed therewith. It is further alleged that the widow accepted the terms of the will, and took under the same and received the portion intended for and given to her by the will ; that Pickens fully complied with the terms of the sale, received a deed, and was placed in possession, etc.

The will is not found in the record in connection with either paragraph of the answer, nor is there any copy of the proceeding resulting in the alleged sale mentioned in the third paragraph of the answer.

Without the terms of the will being set out in some legal way in the paragraphs of the answer, it could not be known by the common pleas, nor can it be known by us, whether the will was such as to put the widow to an election or not. It may, for aught that appears, be expressly given to her by the provisions made for her, in addition to her rights in the real estate. If so, then she was entitled to both. 1 G. & H. 299, sec. 41. Neither paragraph of the answer alleges that this was not so. We can not possibly tell, from what is alleged in the third paragraph, whether the alleged sale and conveyance of the land to Pickens were legal and valid or not. We think the court should have sustained the demurrers to both the second and third paragraphs of the answer.

Other questions are presented arising under the motion for a new trial and the overruling thereof. They relate to the doctrine of election, and as they may again arise in the court below, we will say, concerning them, that the rule as it was at

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common law has been changed by statute, in this State, in its relation to election by the widow between her legal rights as conferred by law and a provision made for her in the will of her deceased husband. The rule as it existed at common law, and as it was applied in this State until changed by statute, is found in *Ostrander v. Spickard*, 8 Blackf. 227, and *Kelly v. Stinson*, 8 Blackf. 387. The statute of 1843, which changed the rule, was referred to and applied in *Smith v. Baldwin*, 2 Ind. 404.

The statute on the subject now in force is sec. 41, p. 299, 1 G. & H., and is as follows :

“If lands be devised to a woman, or a pecuniary or other provision be made for her by the will of her late husband, in lieu of her right to lands of her husband, she shall make her election whether she will take the lands so devised, or the provision so made, or whether she will retain the right to one-third of the land of her late husband ; but she shall not be entitled to both, unless it plainly appears by the will to have been the intention of the testator that she should have such lands, or pecuniary or other provision thus devised or bequeathed, in addition to her right in the lands of her husband.”

This section is like that in the statute of 1843, except that that had reference to the wife's dower, while this relates to her one-third in fee simple. Under this statute, as under that, the presumption is against the intention of a double provision for the wife. If the provision made in the will is declared to be “in lieu of her right to lands of her husband,” she must elect. To this extent the common law rule is not changed. If the will make provision for her in lands or money, or anything else, and it is not expressed to be in lieu of her right in the lands of her husband, and it does not plainly appear by the will to have been the intention of the testator that she should have the provision made by the will, in addition to her right in the lands of her husband, she must elect. It is in this that the change has been made by the statute in the common law rule. If the will declares that the provision made for the wife

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is in addition to her right in the lands of her husband, she is not driven to an election. In this there is no change in the common law rule. In some of the other states, the common law rule has been changed as it has in this State, and the construction of such statute is as here indicated. *Reed v. Dickerman*, 12 Pick. 146; *Thompson v. Egbert*, 2 Harrison, 459; *Collins v. Carman*, 5 Md. 503; *Hilliard v. Binford's Heirs*, 10 Ala. 977; *Bubier v. Roberts*, 49 Me. 460; *Hastings v. Olifford*, 32 Me. 132.

With this statement of the law as it now exists, with reference to the subject, we will reverse the judgment, and the parties can make the issues anew and try the cause again.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrers to the second and third paragraphs of the answer, and for further proceedings.

LEWIS ET AL. v. INGLE ET AL.

APPEAL.—Evidence.—Where a judgment is reversed upon the evidence, the Supreme Court must have a clear legal conviction that the action of the court below was erroneous.

From the Gibson Circuit Court.

C. A. Buskirk and *W. H. Trippet*, for appellants.

D. F. Embree and *J. W. Ewing*, for appellees.

PETTIT, J.—This was an action of replevin for walnut lumber, and the whole case turns upon a contract and the evidence given in support of and against it. If Polk was the owner of the property, and had the right to sell it, the judgment must be affirmed. The contract is as follows:

“JUNE 8th, 1872.

“An agreement is hereby made between S. C. Polk and T. T. Deputy, as follows, to wit: Deputy has sold and agrees to

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furnish to Polk all the walnut lumber that he can conveniently have sawed on his premises under the contract now in operation between Deputy and Knowles & Co., who are sawing lumber on said premises. The said amount of walnut not to be less than two car loads of first and second, as graded by shippers, and for which Polk agrees to receive from the mill when properly manufactured, take charge of, and haul away at his own expense, and within ninety days from the time of being sawed to pay for at the rate of thirty-five dollars per thousand feet for first and twenty-five dollars for second, and the same shall be paid for before being removed from the railroad or wherever stacked for seasoning or shipping.

"S. C. POLK.

"THOMAS T. DEPUTY."

Polk swore that he paid for the lumber before it was removed, and Deputy swore that Polk did not do so. Deputy was a party to the suit and had an interest in it, while Polk was not a party to the suit and had no interest in it. The case was tried by the court below, and we must have a clear legal conviction that its action on the evidence was erroneous before we can reverse, which we have not. But having read and examined all the evidence, we are satisfied that the finding and judgment below were correct.

The judgment is affirmed, at the costs of the appellants.

BAKER v. DESSAUER.

INNKEEPER.—Pleading.—Evidence.—In an action based upon the common law liability of an innkeeper, brought by a guest, to recover for money and a watch stolen from the guest while sleeping in his room, where the circumstances tended to show that the theft was committed by another guest who was admitted to the room without the knowledge of the plaintiff, and while the latter was sleeping, it was erroneous to admit evidence

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in chief of an agreement between the plaintiff and the innkeeper's clerk that no one except A., then occupying the room, and the plaintiff would be admitted to said room during the night, such agreement not being stated in the complaint. It was also error to admit evidence of a like promise made to A. to which the plaintiff was not a party.

SAME.—Liability of.—An innkeeper is *prima facie* liable to a guest for loss or damage to the goods of the latter, but he may exculpate himself by proof that the loss did not happen through any neglect or fault on his part, or that of his servants, for whom he is responsible.

PRESUMPTION.—Evidence.—Where material evidence has been improperly admitted, it will be presumed that it influenced the finding, unless the contrary clearly appear.

From the Marion Superior Court.

C. A. Ray and J. S. Tarkington, for appellant.

W. W. Leathers, for appellee.

WORDEN, J.—Action by the appellee against the appellant, to recover on the common law liability of the defendant as an innkeeper, for the loss of the plaintiff's goods and money, stolen from him while at the defendant's inn as a traveller.

The defendant pleaded the general denial, and other paragraphs, alleging that the plaintiff's loss was occasioned by his own carelessness in not availing himself of the means provided for securing his room, and in not taking proper care of his goods while occupying a room with strangers.

Issue, trial by the court, finding and judgment for the plaintiff.

The case is before us on the evidence and questions of law arising upon the introduction of evidence.

It appears that before the arrival of the plaintiff at the defendant's inn, at least before he had determined to stay all night there, a gentleman of the name of Underwood had engaged room 59, a room with three beds in it. Before Underwood engaged the room, a gentleman, who is called in the record the president of the horticultural society, had been assigned to that room, and when Underwood engaged the room it was agreed between him and the defendant's clerk that no one else save the two should be placed in that room. Afterward, the man of horticulture found a bed elsewhere, and there-

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fore did not occupy room 59. The plaintiff arrived at the hotel desirous of staying all night, and not being able to find accommodations elsewhere that suited him better, concluded to accept a bed in room 59, the clerk agreeing to put no one else in the room except the plaintiff and Underwood. Underwood had gone to bed when the plaintiff was shown up, and got up and unbolted the door and let him in. The plaintiff retired to bed. About twelve o'clock a man arrived at the hotel desiring to stay the residue of the night, who registered himself as of the name of Allen. He paid his bill for lodging and breakfast, and was sent to room 59 to lodge. Underwood got up again and unbolted the door to let him in. There was some parley between the porter and Underwood as to whether Allen should be admitted, but he was finally admitted and went to bed in the bed which was then unoccupied.

The plaintiff does not appear to have had anything to do with letting Allen in. He says he heard in the night "a kind of knocking at the door, but was drowsy, and went to sleep."

When the plaintiff went to bed he placed a part of his clothing on the bed which was afterward occupied by Allen, and the residue was hung up near by. In his pockets he had a watch and chain, and a pocket-book with a little money in it. When Allen went to bed, he removed from the bed the portion of the plaintiff's clothing which had been placed there, and placed it elsewhere. Allen got up in the morning about five o'clock, unbolted the door and left the room, having, as the evidence strongly tends to show, stolen the plaintiff's watch, chain, pocket-book, and contents. He probably escaped from the house about the same time, as he was not afterward seen about the premises. Neither the plaintiff nor Underwood was up at the time Allen got up and left. Underwood, however, was awake. Underwood heard some noise in the latter part of the night in the room, but upon looking around saw nothing wrong.

On the trial, the plaintiff, in making out his case, proved that the defendant's clerk said to the plaintiff that he would not put any one else in the room, and then the plaintiff con-

sented to take the room. The defendant objected to that part of the evidence showing that the clerk said he would not put any one else in the room, as incompetent, irrelevant, and as a distinct and separate agreement, not declared upon. The objection was overruled, and the defendant excepted.

The admission of the evidence was brought in review by the motion for a new trial. It seems to us that the objection to the evidence was well taken.

The strongest circumstance in the case, tending to make the defendant liable, was, that he put Allen into the room after agreeing with the plaintiff that he would put no one else there. But this ground of liability depended upon a special contract not stated in the complaint. The complaint counted upon the common law liability of innkeepers; and if that liability was to be increased by any special contract, the contract, clearly, should be alleged. The evidence might have been competent to rebut the defendant's answer, that the plaintiff's loss occurred through his own negligence in not taking proper care of his goods, etc. The plaintiff, on being assured that no one else would be put into the room, would probably be justified in taking less care of his property than if no such agreement had been made. But the evidence was not offered to rebut the defence. It was offered to make out the plaintiff's case, and before the defendant had offered any evidence. The evidence having been thus received, we cannot say that it was not an element that entered into the mind of the court in finding the defendant liable, without reference to the question as to the plaintiff's negligence. With this agreement left out, the plaintiff's case is much weakened.

There is some conflict in the cases as to the extent of the liability of innkeepers. In some it is held, that they are responsible to the same extent as common carriers. In note 5 to sec. 472, Story Bail., 8th ed., it is said, that "some American cases seem to hold, that the innkeeper may exonerate himself by positive proof that he was not in any way negligent," citing a number of cases, among which is that of *Laird v. Eichold*, 10 Ind. 212. That case decides, that although an

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innkeeper is *prima facie* liable for the loss of the goods of his guest, yet that he may exonerate himself by showing that the loss happened without any fault on his part, and that he exercised the strictest care and diligence.

Under the law, as decided in the case above cited, from 10 Ind., we cannot say that the court would have found the defendant liable, had the objectionable evidence not been given as a part of the plaintiff's case.

Underwood testified as a witness and stated, amongst other things, that when he was assigned to number 59, the clerk told him that the president of the horticultural society had registered for that room, and that no one else would be put into it. The defendant objected to the statement that the clerk told him that no one else would be put into the room, as irrelevant and incompetent, but the objection was overruled, and the defendant excepted. The admission of this evidence was made one of the grounds of the motion for a new trial. This evidence was clearly irrelevant and incompetent. The arrangement between Underwood and the defendant could in no way affect the rights of the plaintiff and defendant as between themselves. What influence this evidence had upon the mind of the court, we cannot tell; but it may have been considered by the court to the defendant's injury.

Where material evidence has been improperly admitted, it will be presumed that it influenced the verdict or finding, unless the contrary clearly appear. *Thompson v. Wilson*, 34 Ind. 94.

For the error in the admission of the improper evidence, the judgment will have to be reversed.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

FERGUSON v. THE STATE.

49	83
160	440

CRIMINAL LAW.—Practice.—Argument to Jury.—On the trial of an indictment for murder, it is error for counsel for the State, in argument to the jury, to comment on the frequent occurrence of murder in the community and the formation of vigilance committees and mobs, and to state that the same are caused by laxity in the administration of the law, and that they should make an example of the defendant, and for the court, upon objection by the defendant to such language, to remark to the jury that such matters are proper to be commented upon.

SAME.—Instruction.—Murder.—Homicide upon Provocation.—On the trial of a defendant on an indictment for murder in the first degree, it was error to instruct the jury, that “to reduce a homicide upon provocation, it is essential that the fatal blow shall have been given immediately upon the provocation given; for if there be time sufficient for the passion to subside, and the person provoked kill the other, this will be murder, and not manslaughter.”

From the Jefferson Circuit Court.

W. T. Friedley, J. W. Gordon, T. M. Browne, and R. N. Lamb, for appellant.

C. A. Buskirk, Attorney General, for the State.

PETTIT, J.—The appellant was indicted for murder in the first degree, for killing John Stillhammer, and was convicted of murder in the second degree, and sentenced to the penitentiary for life. A bill of exceptions shows the following facts, which were also assigned as a cause for a new trial:

“And during the progress of the argument of counsel, counsel for the State commented on the frequent occurrence of murder in the community, and the formation of vigilance committees and mobs, and that the same was” (caused by) “the laxity of the administration of the laws, and stating to the jury that they should make an example of the defendant. And the defendant, by his counsel, asked the court to restrain the counsel, and objected to said comments, because there was no evidence of such matters before the jury; but the court overruled said motion, and remarked in the hearing and presence of the jury, that such matters were proper to be commented

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upon, to which defendant at the proper time excepted, and still excepts."

The comments and arguments of counsel and the remarks of the court during a trial may be within the discretion of the judge presiding, but it is a judicial discretion, and if improperly used to the injury of either party, it may and ought to be revised and controlled by this court. If it was proper to present these things to and comment on them before the jury, it was proper for the jury to consider them in making up their verdict. These things were outside of the record and the evidence, and were calculated to prejudice the rights of the defendant. It was tantamount to saying to the jury, murders have been committed, vigilance committees formed, and mobs assembled in this county, and you may take these matters into consideration in making your verdict; and as you have got a chance now, you may make an example of defendant. The jury may have come to a different conclusion from what they would, if the court had quietly rebuked the counsel, and told him to keep his argument within the facts and evidence in the case. The action of the court was an error, for which, if for no other cause, the judgment must be reversed. The court gave the following instruction to the jury:

"To reduce a homicide upon provocation, it is essential that the fatal blow shall have been given immediately upon the provocation given; for if there be time sufficient for the passion to subside, and the person provoked kill the other, this will be murder, and not manslaughter."

No authority is cited, and we think none can be found to sustain this instruction, except Bicknell's Criminal Practice in this State, 280, and the authority he cites does not sustain him. The authorities, elemental and decided, are against the validity of this instruction.

Zell's Encyclopedia: "Immediately. Without the intervention of any other cause or event. At the present time, on the moment; directly; quickly; at once; *instantly*."

Burrill's Law Dict.: "Immediate. In old English law, immediately; directly; without anything intermediate."

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When a great wrong or injury has been done to or inflicted on a man which has excited his passion, he is not required to punish or resent it at once, but may have such time as is necessary for his passion to cool off; and his physical and mental organization should be taken into consideration in such a case.

All elemental authority and adjudicated cases agree that in such case time must be given for the passion of the injured person to become calm; and many authorities say that the question ought to be submitted to the jury as to whether the passion of the injured person had been actually quieted. We cite, without quoting, the following authorities: *Ex Parte Moore*, 30 Ind. 197; 1 Hale P. C. 453; *The State v. Hildreth*, 9 Ire. 429; *The State v. Yarbrough*, 1 Hawks, 78; *Commonwealth v. Webster*, 5 Cush. 295; *The People v. Johnson*, 1 Parker C. C. 291; Foster's Crown Cases, 290.

The instruction given was erroneous, and the case must be reversed for this as well as for a former noticed error.

The judgment is reversed; and the clerk is directed to issue the proper notice for the return of the prisoner.

49	36
182	553

WILSON v. KINSEY.

PROMISSORY NOTE.—Signing Blank.—Notice of Non-Payment.—For the accommodation of A., B. signed his name with A. on the face of a promissory note payable in bank, a blank being left for the name of the payee. A. stated to B. that he expected to discount the note at the bank where payable, and that the names of the bankers could be inserted at the bank; but no restriction was imposed by B. as to the person to whom the note should be made payable. The note was not discounted by the bank, but was negotiated by A. to C., and the name of C. was inserted by A. as the payee.

Held, that B. was liable on the note to C.

Held, also, that as B. was a maker, and not an indorser, he was not entitled to notice of non-payment.

Wilson v. Kinsey.

From the Hamilton Circuit Court.

D. Moss and *F. M. Trissal*, for appellant.

T. J. Kane, A. F. Shirts, J. W. Evans, and *R. R. Stephenson*, for appellee.

DOWNEY, J.—Suit by the appellant, as payee, against Darwin W. Butler and the appellee, as makers of a promissory note payable at the Citizens' Bank of Noblesville. Butler made no defence. The note has credits amounting to seven hundred dollars.

After issues formed upon an answer by Kinsey alone, and after the evidence was heard, the plaintiff demurred to the evidence of the defendant, the demurrer was overruled, and there was judgment for the defendant. This ruling of the court is here assigned as error.

The note was signed in blank, as to the name of the payee, Kinsey signing for the accommodation of Butler, and given to Butler that he might raise money on it for his own use. Wilson, the plaintiff, loaned him the money, and Butler filled the blank in the note with Wilson's name as the payee.

The question presented is, whether Kinsey is liable on the note or not, under the circumstances disclosed by the evidence. So much of the evidence as is material to this question is as follows :

Kinsey, the defendant, testified as follows, in substance : Butler came to me and asked me if I would endorse the note sued on to the bank for fifteen hundred dollars ; I told him I would ; he got a blank and asked me to sign it—a blank note to Citizens' Bank ; I told him I would not sign a blank, to fill up the note and I would sign it ; he filled up the note, as to the time and amount, and left the names of Locke and Bonebrake, the bankers, blank ; I asked him why he left it blank, and he said he could have the names filled in at the bank ; Butler told me that he had bought two car loads of cattle, and as soon as he shipped them and got returns he would pay the note ; he said he had made arrangements at bank for the money ; nothing was said about my signing or indorsing a note to Wilson ; his name was not mentioned ;

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Wilson did not tell me that he held the note until after Butler became a bankrupt.

Levi testified, that Butler came out of his store, at the corner, and had a paper in his hand, and Wilson asked him what he was going to do with it; he said he was going over to bank to get some money; Wilson stepped round to him and asked him who was on the note; he said Kinsey; after Butler told him that, Wilson said he need not go to the bank; that he would give him a check for it.

Butler testified, that he was the principal in the note.

Bonebrake, a member of the banking firm named, testified: Butler had made no arrangements at the time to borrow fifteen hundred dollars; I do not think the note was ever presented to us to get the money; Butler was getting money of us frequently; an inquiry might have been made as to whether money could be obtained or not, and no note shown; I do not remember of ever refusing Mr. Butler money.

Butler recalled: I told Mr. Kinsey that I wanted to get his name; that I wanted to raise some money; he said, "All right." We went back, and I got a blank note; I told him the amount; that I wanted it to pay for some cattle, etc.; I filled in the amount; he asked the price of the cattle; he signed the note in blank, and I told him it was a bad idea not to fill up a blank, and I then filled it up as to the amount and time; I told him I was going to use the note in bank; that I expected to get money there; Kinsey may have requested me to fill in names of Locke and Bonebrake, and I may have told him it could be done at the bank, but I have no recollection of it; I went over to bank and asked Mr. Bonebrake for the money; told him I wanted fifteen hundred dollars; he told me, if I could get along without it, it would be an accommodation to them; I did not get the money from bank; I did not want to importune Bonebrake for money; my notion was then to get it at Indianapolis; I walked across the street and met Wilson on the corner opposite the bank; asked him if he had any money; I told him that I wanted fifteen hundred dollars; that it was not convenient for the bank to let me have it; he

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said he had it; he came in and gave me a check for the money; I told him I had a note; that I was going to the bank to get the money, and had expected to get it there; Wilson knew, of course, that Kinsey was my indorser, that they had not the money at the bank, and that I would give the note to him; I filled in the name of R. L. Wilson, and gave him the note; I did not transfer the note to Wilson before I went to the bank to see whether I could get the money or not; I used the money to pay for cattle; got fifteen hundred dollars from Wilson for the note.

It is urged by counsel for appellant, that this evidence shows an agreement between Butler and Kinsey that the note should be negotiated to the bank, and not to any other party; that Wilson knew that this agreement was being violated when the note was made payable to him by filling in his name, and that, consequently, the note is invalid in his hands.

We find the law stated thus, in Edwards on Bills and Notes, 95: "Any material alteration made in a note after its execution or indorsement, such as inserting words of negotiability or altering the time or place of payment, discharges the previous parties to it. But where a blank is left in it, there is an implied authority to the holder to fill up the instrument, and make it in fact what it was designed to be. If made payable to blank, the person to whom it is negotiated may fill it up by inserting his own name; if made payable to the order of the person who shall thereafter indorse it, it is negotiable without any alteration, and may be transferred by indorsement. So, if a person sign his name upon a blank paper, and deliver it to another to draw above the signature, he is considered as by that act authorizing it to be filled up for any amount."

Conceding that when the note was signed by Kinsey and given to Butler, he might have restricted Butler, so that he could make the note payable by filling it up to some designated person only, still, it is quite clear, that this restriction could have no effect upon another party to whom it might be made payable for value, and without notice of the restriction.

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We do not doubt, in view of the evidence, that when the note was signed Butler intended to negotiate it at the bank, but we find no evidence of any agreement between him and Kinsey that he should not negotiate it elsewhere. Had Kinsey insisted upon any such thing, it seems probable that when the subject of restricting the authority of Butler was under consideration, he would have insisted upon having the blank for the name of the payee filled, as well as the ones which he insisted on having filled, before he parted with the paper. This he did not do, but permitted the paper to go out into the market as it was. In that condition, it fell into the hands of Wilson, who paid value for it, and who, as we think, is not charged with notice of anything which can affect his right to recover upon the note.

The testimony of Butler is relied upon as bringing home to Wilson the fact that the note was signed by Kinsey under an agreement restricting Butler to a specified person to whom it was to be made payable. If we are right in our conclusion, that the evidence fails to show any such agreement between Butler and Kinsey, then it follows, of course, that Wilson could have had no notice of any such agreement. We think, from the evidence, it is true that Wilson knew that Butler had been or was intending to go to the bank for the money, but this comes far short of showing that Butler had not the right to get the money on the note from any other party who might be willing to purchase it, or loan the money on it.

There is no question in the case as to the application of the money raised on the note. It was applied to the purpose for which it was to be raised.

We have examined the following cases cited by counsel, and which bear to some extent on the question decided: *Johns v. Harrison*, 20 Ind. 317; *Grimes v. Piersol*, 25 Ind. 246; *Armstrong v. Cook*, 30 Ind. 22; *Fetters v. The Muncie National Bank*, 34 Ind. 251; *Houston v. Bruner*, 39 Ind. 376; *Gillaspie v. Kelley*, 41 Ind. 158.

We think the court should have sustained the demurrer of the plaintiff to the evidence of the defendant.

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A cross error is assigned by the defendant, based on the action of the court in sustaining a demurrer by the plaintiff to the second paragraph of the answer of Kinsey. It alleges, that he signed the note as indorser for Butler; that it was made payable at the Citizens' Bank of Noblesville, in Hamilton county, Indiana, payable, twelve days from date; that the note was not presented by the plaintiff at said bank at maturity and payment demanded, nor by any other person for the plaintiff, or at any other time; that the defendant was not notified by the plaintiff, or any other person for him, at the maturity of said note, of the ownership of the note by him, or of its non-payment; that the plaintiff held said note for a long time after, to wit, for three months, before notifying this defendant of the fact; that at the maturity of said note the defendant (Butler?), although in failing circumstances, was abundantly able to pay said note; that the plaintiff, by the use of due diligence, or by notice to this defendant, could have collected the same; that he held said note negligently and carelessly until the insolvency of the defendant Butler, before giving notice to this defendant; that the plaintiff had full knowledge at all times as to the relation this defendant sustained to said note and the financial condition of the defendant Butler; that by reason of the negligence and carelessness of the plaintiff, and knowledge on his part of the foregoing facts, the defendant claims to be discharged, etc.

The ground assumed against this ruling, as we understand counsel, is, that Kinsey was liable on the note as an indorser only, and that he was discharged for the want of notice of the non-payment of the note. This position cannot possibly be sustained. Kinsey was a maker of the note, with Butler his principal, and was not entitled to notice of non-payment. As he, as well as Butler, was bound to pay the note, so he, as well as Butler, was bound to know whether the note was paid or not, without any notice from the holder.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the

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evidence of the defendant, and, after an assessment of the damages, to render judgment for the amount due on the note.

Petition for a rehearing overruled.

BEALE v. THE STATE, EX REL. GRAY.

49	41
152	481

OFFICE.—County Treasurer.—Appointment.—Where a county treasurer, whose term would have expired on the 26th day of August, 1875, vacated his office on the 4th day of September, 1874, a person appointed treasurer on the same day could only hold the office until his successor was elected and qualified, and he was properly required to deliver the office to a person elected treasurer at the regular October election in 1874.

From the Rush Circuit Court.

G. B. Sleeth, J. W. Study, L. Sexton, and O. Cambern, for appellant.

F. Bigger and B. L. Smith, for appellee.

PETTIT, J.—The case is briefly this: On the 4th day of September, 1874, the county treasurer vacated his office, whose term had commenced on the 26th day of August, 1873, and would have continued till the 26th day of August, 1875, had he not vacated it. On the day of the vacation, the board of county commissioners filled the office, and said in their order of appointment that the appointee should hold the office to the end of the term that had been vacated. The Governor, however, commissioned the appointee to hold the office till a treasurer should be elected and qualified. At the regular October election, in 1874, a treasurer was elected, who qualified, was commissioned by the Governor on the 2d day of November, 1874, to hold his office for two years from that date, and properly demanded the office, etc.

The question before us is, was the appointed treasurer entitled to hold to the end of the term that had been vacated, or was he bound to surrender the office on the election and qual-

Taggart et al. v. The State, ex rel. Jackson Township.

ification of a successor? The office is a constitutional one, and the term of an elected treasurer is fixed at two years. Art. 6, sec. 2. The constitution fixes the length but not the beginning of the term of an elected treasurer. At the first session of the General Assembly after the adoption of the constitution, on the 4th of June, 1852, it was enacted that the term of office of the county treasurer shall commence at the expiration of the term of the present incumbent. 1 G. & H. 640, sec. 1. At the same session of the General Assembly, on the 13th day of May, 1852, it was enacted that the board of commissioners shall fill all vacancies in county offices not otherwise provided for, and such appointment shall expire when a successor is elected and qualified, who shall be elected at the next general election. 1 G. & H. 671, sec. 4. The constitution fixes the term of the elected treasurer at two years, and the law fixes the term of the appointed one to be till his successor is elected and qualified, at which time it expires or ends.

The court committed no error in holding, as it did, that the term of the appointed treasurer expired and terminated on the election, qualification, and demand of the office by the elected treasurer.

The judgment is affirmed, at the costs of the appellant.

TAGGART ET AL. v. THE STATE, EX REL. JACKSON TOWNSHIP.

49 42
157 475

OFFICIAL BOND.—County Treasurer.—Relator.—Practice.—Complaint on the official bond of a county treasurer, on the relation of a township, alleging as breaches, that the principal in the bond, while treasurer, received and had in his hands certain funds belonging to the relator, and that after he ceased to be treasurer orders were issued therefor, in favor of the trustee of the relator, upon the treasurer of the county, which the defendant refused to pay, and that he has refused to pay the amounts of the orders to his successor in office, and has converted the same to his own use.

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Held, that, on ceasing to be county treasurer, it was his duty to pay all the public money in his hands to his successor in office, and he could not legally pay the same out on warrants thereafter drawn on the treasurer.

Held, also (PETTIT, J., dissenting), that the suit should have been brought on the relation of the county auditor, instead of the township.

RELATOR.—*Amendment*.—A judgment in the name of a wrong relator cannot be affirmed on the ground that the complaint might have been amended by inserting the name of a new relator.

From the Brown Circuit Court.

F. T. Hord, for appellants.

W. R. Harrison and *W. S. Shirley*, for appellee.

DOWNEY, J.—Action by and judgment for the appellee, against the appellants. Two questions are presented here :

1. As to the sufficiency of the complaint; and,
2. As to the refusal of the court to grant a new trial.

The complaint is on the bond of Taggart, as county treasurer, against him and his sureties. Lewis Jones was trustee of Jackson township.

It appears from the complaint, that Taggart was treasurer from December 23d, 1871, until November 5th, 1872. The bond recites that he was elected for two years, but we infer that he did not serve out the full term.

There are five breaches of the bond assigned. In the first, it is alleged, that Taggart, prior to November 5th, 1872, received and had in his hands four hundred and forty-nine dollars and twelve cents of common school revenue, which sum was duly apportioned to Jackson township, and on the 13th of November, 1872, an order was issued therefor in favor of said Jones as trustee, upon the treasurer of the county; that the same was demanded of Taggart, which he refused to pay. It is also alleged that Taggart has refused to pay the amount of the warrant to the present treasurer, and has converted the amount thereof to his own use.

The second breach is like the first, except that it relates to the sum of ninety-two dollars and thirty-seven cents of special school tax.

Taggart et al. v. The State, ex rel. Jackson Township.

The third is the same as the first, only that it has reference to thirty dollars and twenty cents of township tax.

The fourth differs from the first, in that it relates to thirty dollars and twenty cents of road tax.

And the fifth is like the first, except that the warrant was for twenty-five dollars and twelve cents of dog tax.

It appears from the complaint, as may be seen, that the warrants, which it is alleged Taggart refused to pay, were drawn after he went out of office. The point is made by counsel for the appellants, that at the expiration of his term of office, Taggart was bound to pay the money in his hands to his successor, and could not legally pay the same on warrants drawn on the treasurer. It seems to us that this position is correct. The treasurer is required, at the expiration of his term, to deliver to his successor all public money, books, and papers in his possession. 1 G. & H. 642, sec. 13.

It is provided in sec. 127, p. 102, 1 G. & H., that if any treasurer refuse or neglect to pay over all moneys, etc., he and his sureties shall be held liable, etc. In the next section, it is enacted, that "in any such case, the county auditor, on being instructed to that effect by the Auditor of State, or by the board of county commissioners, shall cause suit to be instituted against such county treasurer and his sureties," etc.

In *Snyder v. The State, ex rel., etc.*, 21 Ind. 77, where the action was on the relation of the succeeding treasurer, it was held that it was improperly brought.

It seems to us, that the action cannot be sustained on the relation of the township. The warrants in favor of the trustee are drawn in the usual form, on the "treasurer of Brown county, Indiana." Taggart was not treasurer when they were drawn. A cause of action had accrued to the State, on relation of the auditor, on the bond, before the warrants were drawn. The warrants were properly payable by the treasurer who was in office when they were drawn, and not by a predecessor, who had gone out of office. If the money with which they should be paid was in the hands of a preceding treasurer, or had been converted by him to his own use, an

Taggart *et al.* v. The State, *ex rel.* Van Buren Township.

action therefor should have been brought, as contemplated by the statute, on the relation of the county auditor. If the township can sue in consequence of the issuing of the warrants in this case, we do not see why any person holding an order on the treasurer may not have his action on the bond. This would cause a multiplicity of actions, without any necessity for it.

It is decided in *Snyder v. The State, etc., supra*, that a judgment in the name of a wrong relator cannot be affirmed on the ground that the complaint might have been amended by inserting the name of a new relator in the court below.

Other objections are made to the complaint, but we do not deem it necessary to consider them or the second error assigned.

The judgment is reversed, with costs, and the cause remanded.

PETTTT, J.—I do not concur in so much of the opinion as holds that the auditor should be the relator. 2 G. & H. 41, sec. 7.

TAGGART ET AL. v. THE STATE, EX REL. VAN BUREN TOWNSHIP.

From the Brown Circuit Court.

F. T. Hord, for appellants.

W. R. Harrison, *W. S. Shirley*, and *W. G. Quick*, for appellees.

DOWNEY, J.—There is no question that needs to be decided in this case, which was not decided in the case of *Taggart v. The State, ex rel. Jackson Township, ante*, p. 42. For the reasons there stated, the judgment in this case must be reversed.

Taggart et al. v. The State, ex rel. Washington Township.

The judgment is reversed, with costs; and the cause is remanded.

TAGGART ET AL. v. THE STATE, EX REL. HAMLIN TOWNSHIP.

From the Brown Circuit Court.

F. T. Hord, for appellants.

W. R. Harrison, W. S. Shirley, and W. G. Quick, for appellee.

BUSKIRK, C. J.—This case is the same as that of *Taggart v. The State, ex rel. Jackson Township, ante*, p. 42; and, for the reasons there stated, this judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with the same directions as in the above cited case.

TAGGART ET AL. v. THE STATE, EX REL. WASHINGTON TOWNSHIP.

From the Brown Circuit Court.

F. T. Hord, for appellants.

PETTIT, J.—This case is, in all legal respects, the same as *Taggart v. The State, ex rel. Jackson Township, ante*, p. 42; and, on the authority of that case, this must be reversed; but I do not concur in that opinion so far as it holds that

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the township is not the proper relator, but that the auditor of the county must be the relator. The township was the party interested. 2 G. & H. 41, sec. 7.

The judgment is reversed, at the costs of the relator.

TAGGART ET AL. v. THE STATE, EX REL. WASHINGTON TOWNSHIP.

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OFFICIAL BOND.—*County Treasurer.*—*Relator.*—An action on the official bond of a county treasurer, for a failure to pay over as required by law money in his hands as treasurer belonging to a township, should be prosecuted on the relation of the auditor of the county.

From the Brown Circuit Court.

F. T. Hord, for appellants.

W. R. Harrison and *W. S. Shirley*, for appellee.

DOWNEY, J.—Suit by the appellee against the appellant, Taggart, treasurer of Brown county, and a part of the other appellants, his sureties, on his official bond.

The complaint alleges the execution of the bond on the 19th day of December, 1872, and sets out the condition, which recites, that Taggart was elected for a term of two years from the 9th day of September, 1871. It is then alleged, that afterward, on the 23d day of December, 1871, certain other persons, the residue of the appellants, executed and acknowledged the bond, as additional sureties thereto. One or the other of the above mentioned dates must be wrong.

There are five breaches of the condition of the bond assigned. In the first, it is alleged, that on the 15th day of June, 1872, by a settlement between the auditor of the county and the trustee of Washington township, there was due and in the hands of Taggart, as treasurer, of common school revenue, one thousand nine hundred and ninety-five dollars and seventy-

Taggart et al. v. The State, ex rel. Washington Township.

two cents, belonging to the township; that on the same day the auditor drew his warrant on the treasurer for said sum, and delivered the same to the trustee, and a copy of the warrant is set out in the complaint. It is then alleged, that on the 6th day of August, 1872, and on divers other days and times before the commencement of this action, Lewis J. Tull, the trustee of the township, demanded payment of the warrant of Taggart, as treasurer, at his office, in, etc., which was refused.

The second, third, fourth, and fifth breaches are the same as the first, except that they relate to the township tax, the road tax, the dog tax, and the special school tax, respectively, and differ in amount.

By agreement, all matters of defence were given in evidence under the general denial. The trial was by the court. There was a finding for the plaintiff. A motion for a new trial was overruled, and there was final judgment for the amount of the finding.

It is assigned as error, that the complaint does not state facts sufficient to constitute a cause of action, and that the court improperly refused to grant a new trial.

In the case of *Taggart v. The State, ex rel. Jackson Township, ante*, p. 42, we decided, that a township holding an order or warrant on the treasury of the county, issued after a treasurer had gone out of office, and after the appointment of a successor, could not maintain an action on its relation, on the bond of the treasurer who had gone out of office, but that the action must be brought on the relation of the county auditor. The question in this case is not quite the same.

It is urged by counsel for the appellant, that the action in this case cannot be maintained on the relation of the township, but should be on the relation of the county auditor. It is enacted, that the revenue collected for county, road, and other purposes, shall be paid over, and settlement therefor made, as may be provided in the several acts and sections relating thereto and to the duties of the county auditors and treasurers. Also, if any such county treasurer shall refuse

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or neglect to pay over all moneys as provided herein, he and his sureties shall be held liable to pay the full amount which he should have paid over, together with interest and ten per centum damages. And again, it is enacted, that, in any such case, the county auditor, on being instructed to that effect by the Auditor of State, or by the board of county commissioners, shall cause suit to be instituted against such county treasurer and his sureties; and no stay of execution or appraisement of property shall be allowed on a judgment rendered or execution issued in such suit. 1 G. & H. 102, secs. 125, 127, and 128. We think the case must be governed by this statute. There is no statute which expressly authorizes a person holding a county order or warrant to sue the treasurer on his bond for not paying it; and it is a question whether he can do so. But we need not decide this question in the case under consideration. *Snyder v. The State, etc.*, 21 Ind. 77, is in accordance with our ruling in this case.

The judgment is reversed, with costs, and the cause remanded.

PETTIT, J., dissents.

TAGGART ET AL. v. THE STATE, EX REL. VAN BUREN TOWNSHIP.

From the Brown Circuit Court.

F. T. Hord, for appellants.

W. R. Harrison and *W. S. Shirley*, for appellee.

WORDEN, J.—This was an action by the State, upon the relation of Van Buren township, in Brown county, Indiana, against the appellants, upon the official bond of Taggart, as treasurer of said county. The action was brought to recover

Taggart et al. v. The State, ex rel. Jackson Township.

money due the township from the treasury of the county, which had been apportioned to the township by the auditor of the county, and for which the auditor had drawn his warrant upon the treasurer in favor of the township. Judgment for the plaintiff.

The question is properly raised, whether the action can be maintained in the name of the State, upon the relation of the township. The action should have been upon the relation of the auditor of the county, as we have decided in the case of *Taggart v. The State, ex rel. Washington Township, ante*, p. 47.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

PETTTT, J., dissents.

TAGGART ET AL. v. THE STATE, EX REL. JACKSON TOWNSHIP.

From the Brown Circuit Court.

F. T. Hord, for appellants.

W. R. Harrison and *W. S. Shirley*, for appellee.

BUSKIRK, C. J.—This case presents the same questions as the case of *Taggart v. The State, ex rel. Washington Township, ante*, p. 47 ; and, for the reasons there stated, the judgment must be reversed.

The judgment is reversed, with costs ; and the cause is remanded, with the same directions as in the above case.

Neal et al. v. The State, ex rel. The Board, etc., Brown Co. et al.

NEAL ET AL. v. THE STATE, EX REL. THE BOARD OF COMMISSIONERS OF BROWN COUNTY ET AL.

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125	538
49	51
128	211
49	51
136	653
49	51
150	314
49	51
163	201

PARTIES.—Relator.—The relator, where one is required, in an action on official bonds, must be the proper one, and he is the real party, while the State is a nominal party.

SAME.—Board of County Commissioners.—Auditor of County.—Treasurer.—Official Bond.—Action On.—Pleading.—Demurrer.—The auditor, and not the board of commissioners of a county, is the proper relator in an action on the official bond of the county treasurer for a failure to pay over funds belonging to the county in his hands as treasurer to his successor and for his conversion thereof to his own use, and a complaint in such action, on the relation of both the auditor and the board, as it does not state a cause of action in favor of all the parties who sue, is bad on demurrer for want of sufficient facts.

From the Brown Circuit Court.

F. T. Hord, for appellants.

W. R. Harrison and *W. S. Shirley*, for appellees.

WORDEN, J.—This was an action by the State, upon the relation of the board of commissioners and the auditor of Brown county, against the appellants herein, upon the bond of William H. Taggart, as treasurer of said county.

Taggart had been removed from his office as treasurer by the board of commissioners, and the action was brought for his failure to pay over to the person appointed as his successor the funds in his hands as such treasurer belonging to the county, and for his conversion of the same to his own use. Judgment for the plaintiff.

It is assigned for error, that the complaint does not state facts sufficient to constitute a cause of action.

The question which first meets us is, whether the action can be maintained upon the relation both of the board of commissioners and the auditor of the county. The auditor of the county is the proper relator in such case. *Snyder v. The State, etc.*, 21 Ind. 77; *Pepper v. The State*, 22 Ind. 399; *Taggart v. The State, ex rel. Washington Township, ante*, p. 47.

It is well settled, that a complaint must state a good cause of action in favor of all the parties who sue; otherwise the

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defendants may demur for the want of a statement of sufficient facts to constitute a cause of action. *Berkshire v. Shultz*, 25 Ind. 523; *Davenport v. McCole*, 28 Ind. 495; *Goodnight v. Goar*, 30 Ind. 418; *Debolt v. Carter*, 31 Ind. 355, 363; *Fatman v. Leet*, 41 Ind. 133.

If a demurrer would have been sustained for the want of a statement of sufficient facts to constitute a cause of action, it follows, that under the statute of 1855 (2 G. & H. 81, sec. 54), the want of such facts may be assigned for error, inasmuch as the objection is not waived by failing to demur.

The cases in this court on official bonds show that where a relator is required, he is to be regarded as the real party, while the State is but a nominal party. All the cases show, that actions upon official bonds, where a relator is required, must be brought upon the relation of the proper party; otherwise they cannot be maintained. An action can no more be maintained on an official bond, upon the relation of a proper party and an improper party, than can any other action where parties improperly unite as plaintiffs, in favor of some of whom no cause of action is shown to exist.

The objection that the facts stated are not sufficient to constitute a cause of action, upon the relation of the auditor and the board of commissioners, is fatal, and the judgment will have to be reversed. This view renders it unnecessary to examine any other question in the case.

There are some other interesting questions discussed, but it will be time to decide them when they arise in a case between proper parties only.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

THE WESTERN UNION TELEGRAPH CO. v. MEEK.

PRACTICE.—*Motion to Strike Out.*—It is not error to sustain a motion to strike out a paragraph of an answer that is no more than an argumentative denial, there remaining a paragraph of general denial.

PLEADING.—*Telegraph Company.*—In a suit under the statute, against a telegraph company, for damages arising from a failure to transmit a message correctly, if the complaint shows that the plaintiff engaged the defendant, and the defendant undertook to transmit the message, the mutual obligation of the parties is sufficient to maintain the action, though it be not alleged that anything was paid for the transmission of the message.

TELEGRAPH COMPANY.—*Regulations.*—*Statutory Obligations.*—A telegraph company cannot, by its own regulations in reference to repeating messages, etc., absolve itself from responsibility, under the terms of the statute, for special damages for negligence. 1 G. & H. 611, sec. 2.

SAME.—Nor can such company be exculpated from damages by showing that its line of telegraph was in good order, that approved instruments were used, and that faithful and competent servants were employed, if the particular act complained of shows negligence in the performance of duty.

SAME.—*What will Constitute Negligence.*—Where the terms of a message sent by telegraph are seriously changed, and the name of the sender entirely disfigured, either by the transmission or copying, it will import negligence on its face.

From the Owen Circuit Court.

J. E. McDonald and *J. M. Butler*, for appellant.

J. C. Robinson and *I. H. Fowler*, for appellee.

BIDDLE, J.—Complaint by appellee against appellant, for failing to properly transmit a telegram. Answer in four paragraphs. Trial by the court, finding for the appellee, followed by the proper steps to bring the case into this court.

Various alleged errors are complained of. A demurrer to the complaint was overruled. This was not erroneous; the complaint is good. The second, third, and fourth paragraphs of the answer were rejected on motion. There was no error in this. They amounted to no more than argumentative denials. The first paragraph was a general denial. The court allowed the appellee to amend his complaint during the trial. We cannot perceive that the amendment affected the rights of the parties in the least. The damages against the appellant, if any arise,

The Western Union Telegraph Co. v. Meek.

must legitimately flow from her own acts, and cannot be affected by a special contract between the appellee and his agent. There was no error in allowing the amendment. And for the same reasons it was not erroneous to allow evidence to go to the matters alleged in the amendment. The amendment and the evidence under it were not improper to show the agency of McKernan, and the right in the appellee to have the message properly sent.

The appellee resided in Spencer, Owen county, Indiana. He had engaged D. S. McKernan & Co. to sell for him certain real estate which he owned in the city of Indianapolis, where McKernan & Co. resided. The appellant had a line of telegraph from Indianapolis, by the way of Spencer, to Vincennes. On the 26th day of August, 1872, David S. McKernan, as the agent of the appellee, delivered to the appellant at Indianapolis, to be transmitted over her line of telegraph to the appellee at Spencer, the following telegram :

“To J. S. Meek, Clerk, Spencer, Owen county, Indiana: Can get four hundred dollars cash, two iron-clad, first-mortgage notes on city property—one six hundred in two years, one six hundred in three years, at six per cent. My commission is one hundred. Must answer by one.

“D. S. MCKERNAN.”

About one o'clock of the same day, the appellant, by her agent, delivered to the appellee, at Spencer, the following dispatch :

“To J. S. Meek, C'ty Clerk: Can get four hundred cash, two iron-clad, first-mortgage notes on city property, six hundred in two years, six hundred in three years, at six per cent. My commission on three hundred. Must answer by one.

“D. H. MULUSOM.”

Section 2, p. 611, 1 G. & H., enacts, that “telegraph companies shall be liable for special damages occasioned by failure or negligence of their operators or servants, in receiving, copying, transmitting or delivering dispatches,” etc.

According to the regulations of the appellant, “all messages taken by this company are subject to the following terms: To guard against mistakes, the sender of a message shall order it

repeated, that is, telegraphed back to the original office. For repeating, one-half the regular rate is charged in addition. And it is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or for the non-delivery of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured."

It is contended that, because it is not averred in the complaint that anything was paid for the transmission of the message, the appellant is not liable; but the complaint and evidence show us that the appellant was a common carrier of messages, and was engaged by the appellee's agent to transmit this particular message. The appellant thereby became entitled to her hire at the usual rates, and the appellee became liable therefor. We think that where the suit is for damages under the statute, as in this case, and not for the fixed penalty, such a mutual obligation is sufficient to maintain the case. When the appellant undertook to transmit the message, her obligation to perform her duty and her right to receive her hire attached.

It is also insisted that, because the appellant was not paid for repeating the message, according to the terms of her regulations, known to the appellee, she is not liable. We think otherwise. While it is competent for the appellant to establish proper rules and regulations for the transaction of her business affairs, which will bind those who transact business with her in the line of her duty, yet she cannot thereby limit any common law or statutory right, or absolve herself from any legal obligation. The statute above quoted fixes her liability, and she cannot by her own regulations avoid responsibility according to its terms; nor can she be exculpated from damages, by showing that she kept her line of telegraph in good order, with approved instruments and all proper appliances, and employed faithful and competent servants, if the

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particular act complained of shows negligence in the performance of her duty.

We are of opinion that the message received by the appellee, when compared with that which the appellant undertook to transmit, imports negligence upon its face. The terms of the proposition were seriously changed, and the name of the sender entirely disfigured either by the transmission or copying.

The general principles which govern telegraph companies were fully discussed, and the authorities supporting them amply cited, in *The Western Union Telegraph Co. v. Buchanan*, 35 Ind. 429. See, also, the case of *Western Union Telegraph Co. v. Ward*, 23 Ind. 377.

The judgment is affirmed, with ten per cent. damages.

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INSTRUCTIONS TO JURY.—*Questions of Fact and Law.*—On the trial of an indictment for assault and battery, the court charged the jury that a policeman's mace, with which the blow was struck, was a dangerous weapon.

Held, that the charge was erroneous. Whether the weapon used was or was not dangerous, was a question of fact, and not of law, and should have been submitted to the jury.

ARREST.—*Made Without Writ.*—A peace officer may arrest for a misdemeanor without a warrant, only on view. He may arrest for a felony without a warrant on view, or upon information when he has reasonable or probable cause to believe that a felony has been committed; but if a private person arrest another for felony on information, and not on view, it devolves on him to justify by showing that the party arrested was guilty of the crime charged.

POLICEMAN.—*Powers of.*—*Presumption.*—When it is shown that a policeman has been duly appointed by the proper authority of a city, whose charter confers on the common council the power to establish, organize, and maintain a city watch, and prescribe the duties thereof, and to regulate the general police of the city, it will be presumed, in the absence of evidence as to the power given to such policeman by the city ordinances, that he possesses the ordinary powers of peace officers at common law.

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From the Vanderburgh Criminal Circuit Court.

C. Denby and *D. B. Kumler*, for appellant.

C. A. Buskirk, Attorney General, *B. Hynes*, and *R. D. Doyle*, for the State.

BUSKIRK, C. J.—This was an indictment against the defendant for an assault and battery upon the body of one Thomas Green. There was a trial by jury, a verdict of guilty, assessing a fine of one cent. There was a motion for a new trial, which was overruled, a motion in arrest of judgment, which was also overruled, and the court rendered judgment on the verdict.

The defendant was a policeman of the city of Evansville, and as such was informed that a brother of the prosecuting witness, Jim Green by name, had stolen a box of cigars. Upon that information, he arrested said Green. He was taking the prisoner to the city prison, and on his way there passed the house of the prosecuting witness. The prisoner expressed a desire to see his brother, the prosecuting witness, and was told by the defendant that he could see him outside the house.

All the persons present agree in their testimony, that the prisoner attempted to either go into the house or escape, and that the appellant knocked him down twice with his mace. In the scuffle that ensued, the appellant and the prisoner got around the corner of the house of the prosecuting witness, about ten feet from the corner. At this point of time, the prosecuting witness heard the noise and went out and placed his hand upon the shoulder of the appellant, and turned him around to the gas-light. The theory of the State is, that the prosecuting witness heard the noise and went out to stop it, without knowing who the parties were, and that he gently laid his hand upon the appellant and turned him around to the gas-light to see who he was. On the other hand, it is contended, that the prosecuting witness knew who the parties were, and went out to aid his brother in escaping. All the witnesses agree, that he laid his hand on the officer before he was struck. The appellant struck him over his head with a mace. It is further argued, that it can make no difference what the real pur-

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pose of the prosecuting witness was, if the appellant had reason to believe, and did believe, that his purpose was to aid in the escape of his brother. The prisoner did, in fact, make his escape. X ✓

✓ Counsel for appellant contend that the second instruction was erroneous, because the court told the jury that the weapon used was a dangerous one, when the question should have been submitted to the jury to determine, as a question of fact. The instruction was in these words: "In coming to a conclusion in this case, it is important that you should consider the character of the weapon used. Custom seems to sanction the use by police establishments of pistols, maces, and other dangerous and deadly weapons, but they ought to use such weapons prudently. There can be no doubt, and in this the jury and counsel for the State and defendant will fully agree with me, that the weapon used by the defendant in this case was a dangerous weapon. Did he use it recklessly or cruelly, or did he use it prudently?"

It is the duty of the court to charge the jury as to all matters of law applicable to the facts proved. It is the province of the jury to ascertain the facts. The question of whether a particular weapon was or was not dangerous was a question of fact, and not of law, and hence should have been submitted to the jury for ascertainment. *Barker v. The State*, 48 Ind. 163. ✓

It is also claimed, that the court erred in giving the following instruction: "If the defendant made the arrest of James Green for a felony, on information and not on view, he made it at his own peril; and in order for him to justify the assault upon Thomas Green, the prosecuting witness, when it becomes a matter of inquiry, it devolves upon the defendant to show that the party under arrest was guilty of the crime for which he was arrested."

In our opinion, the instruction was clearly erroneous.

It never was necessary under the law for a peace officer to "show that the party under arrest was guilty of a crime for which he was arrested." A peace officer has a right to arrest without a warrant, when he is present and sees the offence committed. He has a right to arrest without a warrant, on infor-

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mation, where he has reasonable or probable cause to believe that a felony has been committed; and herein there is a distinction as to the extent of his authority. In cases of misdemeanor, the officer must arrest on view or under a warrant; in cases of felony, he may arrest without a warrant, upon information, where he has reasonable cause. And the reasonable or probable cause is an absolute protection to him, "when it becomes a matter of inquiry," and in no case is he bound to establish the guilt of the party arrested. 1 Hilliard Torts, 2d ed., 233, 234, 235, and notes.]

In *Holley v. Mix*, 3 Wend. 350, the court held: "If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without a warrant, such arrest is illegal though an officer would be justified if he acted upon information from another which he had reason to rely on."

In *Samuel v. Payne*, 1 Doug. 359, Lord MANSFIELD held that if any person charge another with felony, and desire an officer to take him in custody, such charge will justify the officer, though no felony was committed.

In a MS. note of a case of *Williams v. Dawson*, referred to by counsel in *Hobbs v. Branscomb*, 3 Camp. 420, Mr. Justice BULLER laid down the law, that "if a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but that if he receives a person into custody, on a charge preferred by another of felony or breach of the peace, there he is to be considered as a mere conduit, and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable."

In *Hobbs v. Branscomb*, *supra*, Lord ELLENBOROUGH, in speaking of the rule laid down by Judge BULLER, said: "This rule appeared to be reasonable, and that very injurious consequences might follow to the public, if peace officers, who ought to receive into custody a person charged with

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a felony, were personally answerable, should it turn out that in point of law no felony had been committed."

In 1 Chit. Crim. Law, 22, the law is stated thus: "Constables are bound, upon a direct charge of a felony, and reasonable grounds of suspicion laid before them, to apprehend the party accused, and if upon a charge of burglary, or other felony, he be required to apprehend the offender, or to make hue and cry, and neglect so to do, he may be indicted. And a peace officer, upon a reasonable charge of felony, may justify an arrest without a warrant, although no felony has been committed because, as observed by Lord HALE, the constable cannot judge whether the party be guilty or not, till he come to his trial, which cannot be till after his arrest; and, as observed by Lord MANSFIELD in *Samuel v. Payne*, if a man charges another with a felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and, at his peril, exercise his judgment on the truth of the charge; he that makes the charge should alone be answerable; the officer does his duty in conveying the accused before a magistrate, who is authorized to examine, and commit, or discharge."

The law applicable to arrests by a private person is stated with great precision and clearness by TILGHMAN, C. J., in *Wakely v. Hart*, 6 Binn. 316, where, after quoting a provision of the state constitution and commenting thereon, it is said: "But it is nowhere said, that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery, must be arrested on the spot or suffered to escape. So although not seen, yet if known to have committed a felony, and pursued with or without a warrant, he may be arrested by any person. And even when there is only probable cause of suspicion, a private person may without warrant at his peril make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest. These are principles of the common law, essential to the welfare of society,

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and not intended to be altered or impaired by the constitution."

We think the instruction under examination, when applied to arrests by a private person, expresses the law correctly, but when applied to arrests by peace officers, is clearly erroneous.

It is, however, insisted by the Attorney General, that there is nothing in the record showing that the appellant possessed the powers of an ordinary peace officer. The city of Evansville is governed by a special charter, which does not define the powers of the police force. The charter confers on the common council power "to establish, organize, and maintain a city watch, and prescribe the duties thereof," and "to regulate the general police of the city."

The ordinances of the city, defining the duties and prescribing the powers of the police force, were not read in evidence. It is earnestly claimed, that we cannot, under these circumstances, indulge the presumption that the appellant possessed the powers of a conservator of the peace. We take notice of the existence of, and the powers conferred by, the city charter, and that Evansville has a city government. It was proved that the appellant was acting as a policeman in such city. We think we should indulge the presumption, that the police force of such city possessed the ordinary powers of peace officers at the common law, but we do not think the presumption should be carried beyond the powers possessed by conservators of the peace at the common law.

A full and accurate statement of the powers and duties of the police force, under the general act of incorporation of cities, will be found in *Boaz v. Tate*, 43 Ind. 60.

The judgment is reversed, with costs; and the cause is remanded for a new trial, in accordance with this opinion.

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MILLIKIN ET AL. v. THE TOWN OF BLOOMINGTON ET AL.

TOWN.—Trustees, how Elected.—A trustee must be elected for each district of an incorporated town, but each must be elected by the voters of the whole town, at one poll, or place of voting, and the preceding board of trustees, or a majority of them, must act as the inspectors at the election, and the certificates of election must be signed by the trustees present at the election who have acted as inspectors.

SAME.—Tax.—A tax levied by the trustees of a town, to be valid, must be levied by a legally constituted board of trustees, upon property liable to be taxed, and those acting as trustees must each reside in his proper district, and be legally qualified; and the necessary forms in assessing the property, levying the tax, and placing it on the duplicate, must be complied with.

SAME.—Defects Cured.—The act approved March 9th, 1875 (Acts 1875, Reg. Ses., p. 153), cured the irregularities in the election of trustees and in the levy of the taxes complained of in this case.

From the Monroe Circuit Court.

J. W. Buskirk and J. H. Loudon, for appellants.

C. W. Henderson, for appellees.

DOWNEY, J.—This was an action by the appellants against the appellees, to enjoin the collection of certain taxes assessed by the authority of the town. The plaintiffs are owners of property in the town, on which the tax is charged. The grounds of objection to the tax are, that the trustees who made the levy were not legally elected, and their election was not legally certified to the clerk of the circuit court. The town was divided into four wards or districts. A trustee was elected for each district, but they were elected by districts at a separate poll, and not at one poll by a vote of the whole town. The members of the preceding board of trustees, or a majority of them, did not act as inspectors of the election, but, as we infer, persons appointed by them in each district acted as such inspectors. The persons who acted as inspectors in the several districts united in making the certificate of election, which was filed in the office of the clerk of the circuit court. The certificate states the number of votes received by each candidate, and gives the names of those who were elected. We see no

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objection to its form. On demurrer to the complaint, it was adjudged insufficient. To this ruling the plaintiffs excepted, and they have assigned it here as error.

Counsel for the appellees does not attempt to sustain the regularity and validity of the election. We think this could not be done. The election was undoubtedly illegal. While the law provides for the election of a trustee in each district in the town, it clearly contemplated that they shall be elected by a vote of the whole town, and that only one poll, or place of voting, shall be allowed. 1 G. & H. 621, 622, secs. 10 and 15. It is also required, by the statute, that the preceding board of trustees, or a majority of them, shall act as the inspectors. 1 G. & H. 622, sec. 12. It is contemplated by the statute that the certificate to be filed with the clerk of the circuit court, according to sec. 16 of the act, shall be signed by those of the preceding trustees who may be present at the election and act as inspectors.

There is but a single question in the case, and that is, whether those departures from the statute, in holding and certifying the election, render the tax levied by the trustees illegal and void, so that the collection thereof should be enjoined. It is insisted by counsel for the appellees that the trustees who levied the tax were trustees *de facto*, and that the legality of their election and the validity of the tax cannot be questioned in this way.

There are certain matters material to the validity of the tax that are not questioned, and may, therefore, be taken as conceded. Among these are the following:

1. That the board of trustees, if legally constituted, would have the power to levy the tax.

2. That the property of the plaintiffs was liable to be taxed.

3. That the persons claiming to have been elected trustees each resided in his proper district, and possessed the other requisite legal qualifications for the office.

4. That the necessary forms were complied with in assessing the property of the plaintiffs, levying the tax, placing it on the duplicate, etc.

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Who are officers *de jure* and who *de facto*?

At this point in the preparation of this opinion, an act was passed by the legislature and took effect, which, we think, cures the irregularities in the election of the trustees, and in the levy of the taxes in question. Act approved March 9th, 1875, Acts Reg. Ses. 1875, p. 153.

The judgment is affirmed, with costs.

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THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS R. R.
Co. v. MCQUEEN.

TAXATION OF RAILROAD PROPERTY.—*Appeal from Assessment.*—The act in reference to the valuation and taxation of railroad property within this State (3 Ind. Stat. 418) does not provide for any action by the district board of equalization upon the assessment made by the appraisers; and the only appeal authorized is an appeal from the action of the appraisers to the state board of equalization.

SAME.—*Stay of Proceedings.*—Such appeal does not vacate the valuation and assessment made by the county assessors, or suspend proceedings thereon.

SAME.—*State Board of Equalization of 1869 Illegal.*—The state board of equalization for the year 1869 was illegal in its organization; and had it been legally organized, it had no power to act after the time during which it might legally remain in session.

From the Bartholomew Circuit Court.

S. Stansifer, C. Baker, O. B. Hord, and A. W. Hendricks,
for appellant.

F. T. Hord, for appellee.

DOWNEY, J.—This action, which was brought by the appellant against the appellee, was instituted for the purpose of enjoining the collection of certain taxes which were charged against the appellant on the tax duplicate in Bartholomew county, and which were about to be collected by the appellee, as treasurer of the county.

The complaint is as follows: "The plaintiff, for substituted

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complaint, says that the auditors of the several counties of the third congressional district met as a district board of equalization at the town of Vernon, the county seat of Jennings county, on the Wednesday after the third Monday of June, 1869, next after the meeting of the county boards of equalization for that year; and at said meeting said district board appraised and fixed the value of plaintiff's road in said Bartholomew county for taxation, for state, county, and township purposes, at five thousand dollars per mile; from which plaintiff appealed to the state board of equalization for the State of Indiana, which convened at the office of the Auditor of State, at Indianapolis, Indiana, on the 5th day of July, 1869; and on the 14th day of July, 1869, said state board of equalization, upon a hearing of said appeal, reduced said appraisement to three thousand five hundred dollars per mile of their said road in said county, of which the auditor of said county was duly notified by the Auditor of State, and no other appraisement of said road for taxation for the years 1871 and 1872 has been had, yet the auditor of said county, without authority for so doing, entered said road for taxation in said county for the years 1871 and 1872, appraised at five thousand dollars per mile; plaintiff says that the number of miles of its road in said county is ———, and appraised for taxation at three thousand five hundred dollars per mile, the taxes thereon for the year 1871, for state, county, and township purposes, at the rate established for said purposes, amounted to two thousand one hundred and six dollars and six cents, which plaintiff paid to the treasurer of said county, before delinquent; and appraised at five thousand dollars per mile, said taxes amounted to two thousand nine hundred and seventy-four and forty-four cents; and the taxes on said road for the purposes aforesaid, in said county, for the year 1872, appraised for taxation at three thousand five hundred dollars per mile, amounted to two thousand three hundred and seventeen dollars and eighty-nine cents, at the rate of taxation for that year, and plaintiff paid the same to the treasurer of said county before delinquent; and there is

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now charged to plaintiff, on said tax duplicate, the sum of two thousand one hundred and thirty-nine dollars and one cent, including said difference between the valuation at three thousand five hundred dollars, and five thousand dollars per mile, and the interest and penalty thereon; which said sum said treasurer threatens to levy and collect off the property of the plaintiff, if not restrained from so doing by the court; wherefore plaintiff prays the judge of said court to grant a temporary injunction restraining the said treasurer from collecting, or taking any steps to collect, said sum or any part thereof, until the further order of the court; and, upon a final hearing, plaintiff prays that said injunction be made perpetual, and for all other proper relief."

The complaint was verified by the oath of an agent of the company, and a temporary injunction was granted.

The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant excepted.

The defendant then answered, in three paragraphs, as follows:

"1. The defendant for answer herein says that said-pretended state board of equalization, mentioned in the complaint, was not a legal board of equalization for state purposes, and was not composed of delegates chosen by legal district boards of equalization, in this, to wit, that neither of the district boards of equalization was composed of the auditors of the several counties of said districts, as prescribed by law; that the auditors of the fourth congressional district did not meet at the county seat of Decatur county, as required by law, to choose a delegate to such state board, nor did the auditors of the fifth, sixth, seventh, eighth, ninth, and eleventh congressional districts meet at the places required by law, and choose delegates to said state board of equalization; and they say, if any legal delegates or members to said state board of equalization were present at said meeting, such legal members did not compose a majority of the members or delegates required by law, but a

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minority thereof, and as such minority they had no power to bind defendants by an order they made, or might make, but their proceedings were void; that said assessment of taxes, with which plaintiff is charged, is the same as made by the officers lawfully authorized so to do, and adopted by the board of equalization for the said Bartholomew county, and as adopted by the district board of equalization of the congressional district, wherein said Bartholomew county was then situate, for said equalization of said taxes; and said amount of taxes so charged to the said plaintiff, and placed on the tax duplicate as aforesaid, includes said taxes so legally assessed as aforesaid, with the penalty imposed by law on such amount of said tax as remains unpaid, and not the tax as equalized by said unlawful state board of equalization; the said valuation and taxation relied on by plaintiff was made by said state board, and by no other.

“2. The defendant, for further answer herein, says that the pretended board of equalization mentioned in the complaint met on Monday, the 5th day of July, 1869, and continued in session until the 16th day of July, 1869, more than ten days altogether; and on said 16th day of July, 1869, being the eleventh day after said 5th day of July, 1869, and the twelfth day of their session, said board made the order of re-appraisement, whereby ——— per cent. was deducted from the valuation of said railroad company in Bartholomew county, Indiana, it being the same order and resolution mentioned in the complaint; and the said resolution and reduction was without authority of law, and is void; that the said taxes charged to the plaintiff are upon the assessment as the same was made by the proper officers duly authorized to originally assess the same, and as approved by the county and congressional boards of equalization, and upon none other, and said taxes now remaining on the tax duplicate are said residue of taxes, and the penalty imposed by law for non-payment thereof; wherefore the defendant demands judgment.

“3. The defendant, for further answer herein, says that under and by virtue of a law passed by the legislature of the

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State of Indiana, and duly approved by the Governor thereof, and which took effect March 18th, 1859 (see 1 G. & H. 321), the district board of equalization was required to meet at certain points, as therein provided; but defendant charges and avers that the auditors of the counties composing the fourth congressional district, at the time of the passage of said law, did not meet at the county seat of Decatur county, and held no meeting there, and the said counties did not choose or select a delegate to said state board, and none was there present; that the auditors of the counties composing the fifth congressional district, at said time, did not meet at the county seat of Wayne county, and said counties did not select a delegate to said state board; that the auditors of the counties composing the sixth district, at the said time, did not meet at the county seat of Marion county, and said auditors did not select a delegate to said state board; that the auditors of the counties composing the seventh congressional district, at said time, did not meet at the county seat of Vigo county, and they did not select a delegate to attend said state board; the counties composing the eighth congressional district, at said time, did not meet at the county seat of Tippecanoe county, and they did not select a delegate to said state board; the counties composing the ninth congressional district, at said time, did not meet at the county seat of Marshall county; the counties composing the eleventh congressional district did not meet at the county seat of Wabash county; and they did not select a delegate for said districts; and said districts set forth above, composed of said counties then required by law, had no delegates attending said state board; and if there were any legal members attending said state board, they did not compose a majority of the number of delegates required by law, but a minority thereof; they had no power to bind defendant to any order they made, or might make, but their proceedings were void."

The plaintiff demurred to the several paragraphs of the answer. The demurrers were overruled, and the plaintiff excepted.

The plaintiff replied as follows: "That after the passage

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of the law providing for district boards of equalization, the legislature of the State of Indiana re-districted the State for congressional purposes, whereby Greensburgh, Decatur county, the place fixed for the meeting of the district board of equalization for the fourth congressional district, was placed in the third congressional district; Centreville, Wayne county, the place fixed for the meeting of the district board for the fifth district, was placed in the fourth congressional district; Indianapolis, Marion county, the place fixed for the meeting of said board for the sixth district, was transferred to the fifth district; Terre Haute, Vigo county, the place fixed by the said law for the meeting of the board for the seventh district, was transferred to the sixth district; Lafayette, Tippecanoe county, the place fixed for the meeting of said board for the eighth district, was transferred to the seventh district; Plymouth, Marshall county, the place fixed for the meeting of said board for the ninth district, was transferred to the eleventh district; and Wabash, Wabash county, the place fixed for the meeting of the board for the eleventh district, was transferred to the eighth district; thereafter, on the 1st day of June, 1869, John D. Evans, Auditor of State, issued a communication, or proclamation, to the several county auditors of the State, wherein and whereby he recommended and directed that the auditors of the counties composing the congressional districts meet at the time required by law, at the following places, which were central points within the several congressional districts as then organized: first district, at the county seat of Gibson county; second district, at the county seat of Floyd county; third district, at the county seat of Jennings county; fourth district, at the county seat of Rush county; fifth district, at the county seat of Marion county; sixth district, at the county seat of Vigo county; seventh district, at the county seat of Tippecanoe county; eighth district, at the county seat of Miami county; ninth district, at the county seat of Randolph county; tenth district, at Kendallville, in Noble county; eleventh district, at the county seat of Porter county; and the county auditors of the said several congressional districts did meet at

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the time fixed by law, at the above and foregoing designated places, that for the third congressional district being the same fixed by the law providing for said district boards; and when so met, and whilst being in session as such boards, they severally elected and appointed a delegate to the said state board of equalization, which met as averred in the complaint, when a committee on credentials of said delegates was appointed by said board, which committee reported to said board, on the 7th day of July, 1869, that they had examined said credentials, and found that the following named county auditors were duly chosen and appointed members of said board:

"1. Victor Bisch, of Vanderburgh county, for the first congressional district.

"2. James C. O'Brien, of Martin county, for the second congressional district.

"3. Richard D. Slater, Jr., of Dearborn county, for the third congressional district.

"4. C. B. Bently, of Franklin county, for the fourth congressional district.

"5. Eugene Culley, of Brown county, for the fifth congressional district.

"6. Charles D. Woolfork, of Lawrence county, for the sixth congressional district.

"7. A. J. Castater, of Tippecanoe county, for the seventh congressional district.

"8. William Neal, of Grant county, for the eighth congressional district.

"9. Henry J. Rudisell, of Allen county, for the ninth congressional district.

"10. Francis McCartney, of Steuben county, for the tenth congressional district.

"11. A. C. Thompson, of Marshall county, for the eleventh congressional district.

"Which report was concurred in by said board; and said delegates were duly sworn and qualified as such, and thereafter, on the day mentioned in said complaint, reduced said valuation of plaintiff's road, as set forth in said complaint. A

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copy of the proceedings of said state board of equalization and a copy of said communication by said Auditor of State to said county auditors are filed herewith, and all the averments of said answer, not herein specially replied to, are denied."

The defendant demurred to the reply, for the reason that it did not state facts sufficient to constitute a reply, and the demurrer was sustained.

The plaintiff excepted to the ruling, and, refusing further to reply, final judgment was rendered for the defendant.

Errors are assigned by the appellant as follows:

1. Overruling the demurrer to the first paragraph of the answer.
2. Overruling the demurrer to the second paragraph of the answer.
3. Overruling the demurrer to the third paragraph of the answer.
4. Sustaining the demurrer to the reply.
5. Finding against the appellant for want of a reply.
6. Dissolving the temporary injunction.

The appellee has pleaded a denial of the errors assigned by the appellant, and has assigned as a cross error the overruling of his demurrer to the complaint.

It appears to be the desire of counsel in this case, that we shall decide the questions argued in the briefs, whether they are presented by the record or not. It is conceded by counsel for the appellant that the case was commenced under a misapprehension as to the state of the law bearing upon it, they supposing that the provisions of the general law touching the assessment of real estate for taxation governed the case, when, in fact, it was governed by the act of 1865 entitled "an act to secure a just valuation and taxation of all railroad property within this State, to legalize the valuation, assessment, adjustment and payment of taxes for such property, made subsequent to the year 1859." 3 Ind. Stat. 418. As the two laws are essentially different, it is not strange that the questions in the case are not well presented by the record. We must, of course, examine the questions with reference to the law of

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1865. The first section requires the company on or before the first Monday in April, 1869, and each year thereafter, in which there shall be a general appraisement of the real property of the State, to "furnish to the appraiser of each county through which their respective roads may run a written statement of the length of the line of such roads within his county, and also a statement of all the machine shops, depots, depot grounds, rolling machinery and other property of such company, used by it in doing the business thereof within this State, and of the gross earnings, and also of the average net earnings of such road over and above the current necessary expenses in transacting its business, and for repairs during the five years immediately preceding such statement which shall be verified by the oath or affirmation of the proper officer of such company making such statement."

The second section provides, that the appraisers of the counties through which the road shall run, if through more than one county, shall, within, etc., meet at, etc., and appraise the value of the road per mile, etc., and apportion the same among the counties.

Section 5 of the act provides, that "if any railroad company shall be dissatisfied with the valuation so made by said county appraisers, such company may, provided they have complied with the provisions of the first section of this act, appeal therefrom to the state board of equalization at its first session thereafter, by serving a written or printed notice, sealed with its corporate seal, on the Auditor of State to that effect, not less than ten days before the meeting of such board, and said board of equalization is hereby empowered to examine the alleged grievances and grant such relief as may be deemed just."

This law does not provide for any action by the district board of equalization upon the assessment made by the appraisers, nor does it provide for an appeal from the district board to the state board of equalization. Hence, when the complaint speaks of the action of the district board of equalization, with reference to this matter, it speaks of something which is not recognized or authorized by the law; and so as to the appeal

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from the action of the district board. The only appeal authorized by the act is an appeal from the action of the appraisers to the state board of equalization, according to the fifth section above set forth.

It is said by counsel for appellant: "The complaint, however, is good on demurrer. It is averred that the district board 'appraised and fixed the value of plaintiff's road in said Bartholomew county, for taxation for state, county, and township purposes, at five thousand dollars per mile, from which plaintiff appealed to the state board of equalization for the State of Indiana, which convened at the office of the Auditor of State, at Indianapolis, Indiana, on the 5th day of July, 1869, and on the 14th day of July, 1869, said state board of equalization, upon a hearing of said appeal, reduced said appraisement to three thousand five hundred dollars per mile of their road in said county, of which the auditor of said county was duly notified by the Auditor of State, and no other appraisement of said land for taxation for the years 1871 and 1872 has been had; yet the plaintiff says that the auditor of said county, without authority for so doing, entered said road for taxation in said county for the years 1871 and 1872, appraised at five thousand dollars per mile.'"

Conceding, without deciding that the complaint is good, we will refer to and examine the paragraphs of the answer.

The first paragraph shows, that the pleader was under the same misapprehension, with reference to the law of the case, as that which contributed to shape the complaint. As to the legality of the state board of equalization, which is called in question by the first part of the paragraph, we do not deem it necessary to do more than to say that that body has already been held illegal by this court in two cases: *The State, ex rel. Evans, v. McGinnis*, 34 Ind. 452, and *Shoemaker v. The Board of Comm'rs, etc.*, 36 Ind. 175.

The paragraph has another allegation, which we think fairly meets the allegation relied upon in the complaint to make it good. That allegation is, "that said assessment of taxes with which the plaintiff is charged is the same as made by the offi-

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cers lawfully authorized so to do," etc. What follows with reference to the assessment having been adopted by the board of equalization of Bartholomew county, and the district board of equalization of the congressional district, is immaterial. We regard the first paragraph of the answer as sufficient.

The second paragraph alleges, *inter alia*, that the taxes were levied upon the assessment as the same was made by the proper officers duly authorized to originally assess the same, and that the alleged change made by the state board of equalization was made more than ten days after it met. The state board, had it been legally formed, had no power to act after the time during which it might legally remain in session. This is so decided in *The State, ex rel. Evans, v. McGinnis, supra*. We think the second paragraph of the answer a good bar to the action.

The third paragraph shows that a majority of the district boards of equalization failed to meet at the places designated by law; that they had no delegate attending the meeting of the state board, and that only a minority of the members of the state board were legal members thereof. But the answer does not, in any way, meet the allegation in the complaint, that "no other appraisement of said road for taxation for the years 1871 and 1872 has been made," than as stated in the complaint. For this reason we do not see how it can be sustained. It would seem to be wholly immaterial what action was taken by the state board, if there was no other assessment made than that which is alleged to have been made by the district board of equalization, since, as we have seen, the district board had no power to make any assessment. In our opinion, for this reason, the third paragraph of the answer was bad.

The reply, as may be seen, was to all the paragraphs of the answer. If we concede that the state board of equalization was a legally organized board, or a board *de facto*, as claimed, still, it could not have prolonged its session, as we have seen, beyond the period of ten days; and, as the second paragraph of the answer alleges that the reduction in the amount of the appraisement was made after the expiration of that time, and

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as the reply must be good as to both the first and second paragraphs of the answer, which we have held good, or bad as to both, it seems clear to us, that there was no error in sustaining the demurrer thereto. It makes no attempt to deny or avoid the allegation in the second paragraph of the answer, that the reduction was made after the expiration of ten days from the time of the meeting of the board.

Upon the record, as it stands, the appellee is entitled to an affirmance of the judgment.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

BUSKIRK, C. J.—A very able and elaborate brief has been submitted by counsel for appellant, in support of her petition for a rehearing. We are again urged to overrule the case of *The State, ex rel. Evans, v. McGinnis*, 34 Ind. 452, which held the state board of equalization of 1869 illegal, and its proceedings void. We are entirely satisfied with the ruling in that case, and the grounds upon which it proceeded. It was followed and adhered to in the subsequent case of *Shoemaker v. The Board, etc., of Grant County*, 36 Ind. 175.

The facts in the present case are, in substance, the same as in the *The State, ex rel. Evans, v. McGinnis, supra*.

The facts averred in the third paragraph of the answer do not show, in our opinion, that the state board of equalization was a legal body. The matters set up in the reply do not materially affect the question involved or render necessary a different ruling.

It is, in the next place, earnestly insisted, that the appeal by the appellant from the valuation made by the county assessors to the state board of equalization either vacated the valuation and assessment made by the county assessors, or suspended proceedings thereon until there was a decision of such appeal by a valid and legal state board of equalization.

If either proposition is true, the injunction should have been granted. If the appeal vacated the valuation and assessment

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made by the county assessors, then there is not now, nor has there been since such appeal was taken, any valid assessment against the appellant. If the appeal, on the other hand, suspended proceedings upon such valuation and assessment until the appeal was decided, then the result and legal effect must be the same, for there has been no decision rendered on such appeal by any legal state board of equalization. In either event, the appellant has not been legally assessed with taxes on such assessment since such appeal was perfected.

The fifth section of the statute of 1865, Acts Special Session, p. 123, gives the right of appeal, and is as follows:

“Sec. 5. If any railroad company shall be dissatisfied with the valuation so made by said county appraisers, such company may, provided they have complied with the provisions of the first section of this act, appeal therefrom to the state board of equalization at its first session thereafter, by serving a written or printed notice, sealed with its corporate seal, on the Auditor of State to that effect, not less than ten days before the meeting of such board, and said board of equalization is hereby empowered to examine the alleged grievances and grant such relief as may be deemed just.”

There is no provision in the statute declaring the force and effect of the appeal. It is neither provided that such appeal shall vacate the valuation made by the county appraisers, nor suspend proceedings thereon. The appellant was not required to give any bond. The question was not to be heard *de novo* by the state board of equalization. The board was empowered to examine the alleged grievances, and grant such relief as might be deemed just. The state board was limited and restricted to the examination of alleged grievances. If grievances were shown to exist, then the power was conferred to grant relief, otherwise not. The valuation of the county appraisers remained in force, and the presumption was to be indulged that it was correct; and the grievances were to be alleged and shown by the appellant. The board was empowered simply to examine and review the action of the county appraisers, in the particulars alleged and shown to exist. The

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powers of the board were of the same character and extent as those of this court, which sits as a court of error, to correct such errors as are assigned and shown to exist in the proceedings of the lower courts.

In *Young v. The State*, 34 Ind. 46, the effect of an appeal was considered and decided, where the court said: "When an appeal is taken and perfected from the judgment or determination of an inferior court to a superior court, as in the case of appeals from the board of commissioners, or from a justice of the peace to the circuit or common pleas court, and the cause or matter is to be tried in the circuit or common pleas court *de novo*, upon the original papers, the appeal operates to suspend or supersede further proceedings under the judgment or determination from which the appeal is taken."

The ruling in the above case has been adhered to in *Lincoln v. The State, ex rel. Wood*, 36 Ind. 161, and *Blair v. Kilpatrick*, 40 Ind. 312.

Then, as the appeal to the state board was not to be tried *de novo*, upon the original papers, it manifestly results, from the doctrine above stated, that it did not suspend or supersede the valuation made by the county appraisers; and as the state board of equalization was illegal, and its proceedings void, it follows, that the action and determination of the county appraisers remained in full force and unaffected by such appeal. The Auditor of State had the power to require the appellant to pay taxes upon the valuation made by the county appraisers.

The petition for a rehearing is overruled.

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MCMULLEN ET AL. v. CLARK.

PRACTICE.—Assignment of Error.—Where the only error assigned is the overruling of a motion for a new trial, an alleged error in ruling upon a motion to suppress a deposition, not made a ground of the motion for a new trial, is not presented.

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SAME.—Agreement to Read Deposition in Evidence.—Where the deposition or sworn statement of a witness purports to have been taken “to be read in evidence (subject to all legal exceptions) in lieu of an oral examination,” it may be read in evidence though the witness reside in the county and be able to attend court.

SAME.—Instruction.—The assignment, as a ground for a new trial, of the refusal of a certain instruction asked, and the giving of oral instructions, does not include an objection to an oral modification of the instruction asked.

VERBAL ADMISSIONS.—Weight of.—Imperfection of memory is not the only infirmative circumstance to be considered in weighing the force of verbal admissions.

PRESUMPTION OF LAW.—Partners.—In a suit upon a promissory note, where the defendants are charged with having made the note sued on as partners by their firm name, and where the execution of the note is denied under oath, proof that the defendants so denying were partners with the other defendants at the time the note was made does not raise a presumption of law that the note is a firm note.

From the Park Circuit Court.

J. M. Allen and W. Mack, for appellants.

DOWNEY, J.—The error assigned in this case is the refusal of the court to grant a new trial on motion of the defendants, who are appellants in this court. The action was by the appellee against Daniel McMullen, Cornelius M. Barnes, and Edward L. Wheat, administrator of John Kilburn, deceased. The complaint was in three paragraphs, each predicated upon the same promissory note. The note was for eleven hundred and twenty-eight dollars, dated May 26th, 1869, to mature in twelve months, and was signed by John Kilburn alone.

In the first paragraph, it is alleged that the defendants were partners in business, and as such partners borrowed the amount of money of the plaintiff, and gave the note by their firm name of John Kilburn. It is alleged, also, that the said money went to the benefit of the defendants, and that John Kilburn afterward departed this life, and that said Wheat became administrator of his estate.

In the second paragraph of the complaint, it is alleged that Kilburn was carrying on business in his own name; that McMullen and Barnes were silent partners with him in business; that the plaintiff loaned to the defendants said sum of

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money, and Kilburn executed the note therefor in his own name; and that the money went into and was used by said firm.

In the third paragraph of the complaint, it is alleged that the defendants, under the firm name and style of John Kilburn, executed to the plaintiff their note, by which they promised to pay, etc., in the usual form of complaints on promissory notes. A copy of the note was filed with the complaint.

McMullen and Barnes answered in four paragraphs:

1. A general denial.
2. That the note was executed by Kilburn, on his own account, in renewal of a note given for his individual debt, and that the said firm derived no benefit whatever from the note.
3. That the defendants never executed the note in the manner and form charged in the complaint.
4. That the note was given without any consideration.

The second and third paragraphs of the answer were verified by the oath of the defendants pleading the same. Wheat, administrator of Kilburn, made default. There does not appear to have been any reply. The issues were tried by a jury, and there was a general verdict for the plaintiff, and answers to interrogatories by which they found that the note was given in renewal of a note of eight hundred dollars and interest, given by John Kilburn to John Clark, and that McMullen and Barnes were partners of Kilburn in 1862, when the note for eight hundred dollars was made.

A motion was made by the defendants for a new trial, for the following reasons:

1. The verdict is not sustained by the evidence.
2. It is contrary to law.
3. Refusal to admit evidence offered by defendants.
4. Admission of improper and illegal testimony by plaintiff and excepted to by defendants, to wit, depositions of King and Huxford.
5. In giving instructions to the jury, to wit, one and two, given by the court.

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6. Refusing instructions asked by the defendants, and excepted to, to wit, number one, and giving verbal instructions, and refusing number six.

The court overruled this motion, and also a motion for judgment in favor of the defendants on the special findings of the jury, and rendered judgment on the verdict for the plaintiff.

The only error assigned is the overruling of the motion for a new trial. We have to consider the questions presented without any brief on behalf of the appellee. We will consider the questions as presented in the brief of counsel for appellants.

The first question argued is the refusal of the court to suppress parts of the deposition of King. The ruling of the court on the motion to suppress depositions was not made a ground of the motion for a new trial. For this reason, that question is not presented by the record.

The second question presented is based upon the ruling of the court in admitting as evidence parts of the sworn statement of John Huxford. This statement was in the form of a deposition, containing an examination and cross-examination, and purports to have been taken "to be read in evidence (subject to all legal exceptions) in lieu of an oral examination." One ground of objection was, that the witness resided in the county, was able to attend court, and the statement was not a deposition. We think we should understand from the facts disclosed that it was intended that the statement should be read as evidence unconditionally, except as to such objections as might, for other reasons, be legally made to it. An objection was made to the reading of certain parts of the statement, but the objection appears, by the bill of exceptions, to have been made after the paper was read, and the ground of objection was not stated. There was no error in disallowing the objection.

The next point relates to the giving of oral modifications of instruction number one asked by the defendants. The modification of instruction number one is not mentioned in the motion for a new trial as one of the grounds thereof. The

refusing of instruction number one, asked by the defendants, was mentioned, and the giving of verbal instructions. The appellants must be confined to the objections made and exceptions taken in the circuit court.

Instruction number six asked by the defendants is as follows: "Verbal admissions, consisting of mere repetitions of oral statements made a long time before, are subject to much imperfection and mistake, for the reason that the party making them may not have expressed his own meaning, or the witness may have misunderstood him, or by not giving his exact language may have changed the meaning of what was said, and this is especially true where a long time has passed since the admissions were made; such evidence should, therefore, be received by you with caution." In lieu of this, the court gave the following: "In regard to verbal admissions, you will consider imperfections of memory and carefully weigh the evidence, and give them such credit as they are entitled to." We think the defendants were entitled to the full force of the instruction asked. Imperfection of memory is not the only infirmative circumstance to be considered in weighing the force of verbal admissions. The instruction asked was correct, as a statement of the law, and should have been given as asked. It was applicable to the case as presented to the jury by the evidence, and the giving of it might have produced a different result.

The court gave the following instruction: "In this case, it having been admitted by the defendants that in 1869, when the note in suit was given, they were partners with John Kilburn, doing business under the firm name of John Kilburn, the presumption of law is, that the note is a firm note, and you will find for the plaintiff, unless the defendants show, by a preponderance of evidence, that the note was not a partnership note and transaction." This charge was clearly wrong. There is no such presumption of law. The defendants, McMullen and Barnes, having, under oath, denied the execution of

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the note, the *onus* was upon the plaintiff to show their liability, and not upon them to show that they were not liable.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

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PARTNERSHIP.—*Judgment Against One Partner.—Suit Against the Others.*—

The recovery of a judgment against one partner bars an action against the other partners upon the same cause of action.

SAME.—*Execution of Note by One Partner.*—The execution of a note by one of several joint debtors does not operate as a satisfaction of the original debt, in the absence of an express agreement that it shall be received in full satisfaction.

PRACTICE.—*Appeal from Justice's Court.—Pleading in Appellate Court.*—Where an action commenced before a justice of the peace is taken by appeal to a higher court, the defendant is not injured, nor will a judgment be reversed, by reason of the court's sustaining a demurrer to good paragraphs of an answer, if the matters set up in the answers are provable under the general issue.

DEPOSITION.—*Motion to Suppress Deposition.*—A motion to suppress a deposition, because the names of the parties are not properly indorsed on the envelope, cannot be made after the publication of the deposition.

SAME.—Where a party appears at the time and place given in a notice to take depositions, and consents that they may be taken at another place, he cannot afterward object that they were not taken at the place named in the notice.

SAME.—If a deposition shows that the taking was adjourned from day to day, without assigning any cause, where the notice provided for adjournments, a party who appeared at each adjournment without objection cannot afterward object.

SAME.—Parties are not injured by, nor can they complain of, questions and answers in a deposition that tend to sustain their theory of the case.

EVIDENCE.—*Secret Partner.*—In an action against partners, two of whom are alleged to be dormant, for goods sold to them, it is competent for the plaintiff to testify whether he was informed of the existence of the secret partners, and if so, when and how he received the information.

SAME.—A witness may be asked to describe a note, for the purpose of identifying it, and such question will not call for the contents of the note.

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SAME.—Where a letter is written, in the name of partners, by one employed to act for them, it is competent for them to show by whom and under what circumstances it was written.

From the Allen Common Pleas.

L. Newberger, G. H. Voss, B. F. Davis, and J. A. Holman,
for appellants.

A. Zollars and F. T. Zollars, for appellees.

BUSKIRK, C. J.—This was an action by the appellees against the appellants. The action was commenced and tried before a justice of the peace, who rendered a judgment for the appellants, from which judgment the appellees appealed to the court of common pleas. In the latter court, the cause was tried by a jury, and resulted in a verdict for the appellees. The court overruled a motion for a new trial, and rendered final judgment upon the verdict.

The complaint was in two paragraphs. The first paragraph alleges, that the appellees were a firm, doing business under the firm name of Edward Simon & Brother, and that on and before and after the 20th day of July, 1868, the appellants were engaged in the manufacture of trunks, and selling valises and travelling bags, in Fort Wayne, Indiana, and that at that time the appellants were all partners in said business, under the firm name of John Lingenfelser; that said Henry and Emil Lingenfelser were secret and silent partners in said firm, and fraudulently and falsely concealed from the plaintiffs and the public the fact that they were partners with said John Lingenfelser. A further allegation, that on the 20th day of July, 1868, the plaintiffs, upon the order of John Lingenfelser, sold and delivered to said firm of John Lingenfelser a bill of goods, consisting of travelling bags, etc., amounting to one hundred and eighty-seven dollars and twelve cents, a bill of particulars being made a part of this paragraph; that the same was due, etc.

The second paragraph states, that the plaintiffs (appellees) on the 20th day of July, 1868, upon the order of John Lingenfelser, sold and delivered to said firm of John Lingenfel-

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ser a bill of goods, etc., and that they (appellants) on the 22d day of September, 1868, promised to pay for said goods, etc.

In the court of common pleas, the appellants filed an amended answer, in six paragraphs. The first was the general denial.

The second paragraph was as follows: "Defendant John Lingenfelter, for second and further answer, says that the plaintiffs recovered judgment against the defendant John Lingenfelter for the same demand since the creation of said claim now made in plaintiffs' complaint herein, which judgment is of record in the records of this court; wherefore said defendant John Lingenfelter prays for judgment and for costs against said plaintiffs."

The third paragraph was as follows: "And for third and further answer, the defendants Henry and Emil Lingenfelter say that the claim now sued upon by plaintiffs in this action is not against them of right, nor by them owing to said plaintiffs at all, but by said John Lingenfelter in judgment, and that they are not indebted, nor are they bound, unto said plaintiffs for the debt of John Lingenfelter by law, not having so promised in writing, nor in equity, having never made any promise which said plaintiffs accepted for said claim."

The fourth paragraph was as follows: "Defendants, for fourth and further answer, say that the said claim sued upon by said plaintiffs was satisfied by defendant John Lingenfelter giving his promissory note therefor, to the satisfaction of said claim of said plaintiffs; that said John Lingenfelter does not know where said note is; wherefore," etc.

The fifth paragraph of the answer was as follows: "For fifth and further answer to the second paragraph of the complaint, defendant John Lingenfelter says that he admits the indebtedness in said second paragraph contained, but further says that said plaintiffs recovered a judgment in this court on the — day of —, 1868, for the same identical claim sued on, and prays that so far as he was concerned this action may be dismissed as to him; wherefore," etc.

The sixth paragraph of the answer was in these words: "Defendants, for sixth and further answer to first paragraph

of plaintiffs' complaint, say that said defendant John Lingenfelter settled and satisfied in full the account sued upon in this action before this action brought by his, defendant John's, promissory note."

The court sustained a demurrer to the second, third, fourth, fifth, and sixth paragraphs of the answer, to which ruling the appellants excepted.

The appellants have assigned for error the sustaining of the demurrer to the answer, and the overruling of the motion for a new trial.

The first question presented for our decision is, whether the court erred in sustaining the demurrer to the answer.

We will consider the second and fifth paragraphs together, as they present the same question, the second being the separate answer of John Lingenfelter, and the fifth being the joint answer of Henry and Emil Lingenfelter.

It is alleged in the complaint, that John, Henry, and Emil Lingenfelter were partners; that the business was carried on in the firm name of John Lingenfelter; that Henry and Emil were silent and secret partners in said firm, and fraudulently concealed from the plaintiffs and the public the fact that they were such partners; that the plaintiffs sold to the said John Lingenfelter a bill of goods, for the value of which the plaintiffs sought in this action to recover against all of the partners of said firm.

The substance of the second and fifth paragraphs of the answer was, that the plaintiffs had recovered a judgment against the said John Lingenfelter, for the same identical cause of action set out in the complaint. Did this constitute a bar to the action? We are of opinion that the recovery of a judgment against one partner bars an action against the other partners, upon the same cause of action.

It was held, by the Supreme Court of the United States, in the case of *Mason v. Eldred*, 6 Wal. 231, that the recovery of a judgment against one partner bars an action against the others, though the latter were dormant partners of the defend-

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ant in the original action, and this fact was unknown to the plaintiff when that action was commenced. The court, after reviewing the English and American cases, say: "The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when the action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause."

The question arising upon the second and fifth paragraphs of the answer was very fully considered by this court, and decided in accordance with the doctrine laid down in the above case; in the case of *Crosby v. Jeroloman*, 37 Ind. 264.

The third paragraph only amounted to the general denial, and should have been stricken out. There was no error in sustaining the demurrer to it.

The fourth paragraph presents for our decision the question of whether the execution of a note by one of several joint debtors operates as a satisfaction of the original indebtedness, in the absence of an express agreement that the note should be received in full satisfaction.

In *Maxwell v. Day*, 45 Ind. 509, it was held, that "the taking of a note from one of several joint debtors for a pre-existing debt, is no payment, although security may be given thereon, unless it be expressly agreed to be taken as payment, and at the risk of the creditor."

In addition to the authorities there cited, we cite *Schemerhorn v. Loines*, 7 Johns. 311, and *Muldon v. Whitlock*, 1 Cow. 290. In the case last cited, it is said, by SUTHERLAND, J.,

that "no principle of law is better settled, than that taking a note either from one of several joint debtors, or from a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to be taken as payment, and at the risk of the creditor. Nor does the taking a note, and giving a receipt for so much cash, in full of the original debt, amount to evidence of such express agreement to take the note in payment. The agreement must be clearly and explicitly proved by the original debtor, or he will still be held liable."

The sixth paragraph was, in substance, the same as the fourth.

The fourth and sixth paragraphs were bad.

The second and fifth paragraphs were good, but this action having originated before a justice of the peace, the appellants were not injured by such ruling, as all the matters therein averred were provable under the general issue. The trial should have proceeded in the common pleas in the same manner, and should have been governed by the same rules, as before the justice. In a trial before a justice, every defence may be proved under the general issue, except set-off, statute of limitations, *non est factum*, and in abatement. Sec. 34, 2 G. & H. 585.

It is the settled rule of this court, that a judgment will not be reversed because a demurrer was wrongfully sustained to a paragraph of answer which contained a good defence, if there was another paragraph under which the same facts could have been proved. *The Terre Haute Gas Co. v. Teel*, 20 Ind. 131; *Hynds v. Hays*, 25 Ind. 31; *The Evansville, etc., R. R. Co. v. Baum*, 26 Ind. 70; *Bersch v. The Sinnissippi Ins. Co.*, 28 Ind. 64; *Wolf v. Schofield*, 38 Ind. 175; *Peery v. The Greensburgh, etc., Turnpike Co.*, 43 Ind. 321; *Bailey v. Troxell*, 43 Ind. 432; *Bernhamer v. Conard*, 45 Ind. 151; *Kernodle v. Caldwell*, 46 Ind. 153.

In *Bernhamer v. Conard*, *supra*, it was held, that in an action commenced before a justice of the peace, sustaining a demurrer to a good paragraph of an answer that is not a plea in abatement, an answer of set-off, or an answer of the statute of limitations, is not error.

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The appellants moved to suppress certain depositions, which motion was overruled, and the question is reserved by a bill of exceptions.

The first ground of objection is, that the names of the parties to the action are not properly endorsed on the envelope. The motion was made after the publication of the deposition. It came too late. Sec. 266, 2 G. & H. 178. As the endorsements on the envelope are not in the record, we cannot say that they were not sufficient.

Another ground of objection is, that the depositions were not taken at number 332 Broadway, N. Y., the place named in the notice.

The record shows, that the appellants, by attorney, appeared at the time and place named and consented that they might be taken at a different place. This was a waiver of the objection now urged. *Doe v. Brown*, 8 Blackf. 443.

Another ground of the motion to suppress is, that the taking of the depositions was adjourned from day to day, without any cause assigned. The notice provided for adjournments. Counsel for appellants appeared at each adjournment, without objection. There was no error in this.

The motion to suppress was properly overruled.

The appellants moved to suppress the third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, fourteenth, fifteenth, sixteenth, twentieth, twenty-first, and twenty-second questions, and answers thereto, in the deposition of Samuel Simon. The motion was overruled, the question is reserved by a bill of exceptions, and is assigned for error here. The third, fifth, and sixth questions were preliminary, and unobjectionable.

The seventh was: "State whether you have ever been informed that John Lingenfelser had any secret partners at the time of the sale of the goods mentioned; and if so, state when and how you received that information.

"Ans. I have been informed that John Lingenfelser had secret partners when the goods were sold to him, and the infor-

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mation reached me after the amount became due and suit commenced."

The question was proper, if the purpose was to prove by the admissions of the defendants, or either of them, that Henry and Emil were the dormant partners of John Lingenfelter; but the fact of such partnership could not be proved by hearsay evidence. But we think the purpose of such question was not to prove the partnership, but whether the deponent had been so informed, and when. The answer was, that such information had been received after the note was taken and the suit commenced. The answer discloses nothing in reference to who such dormant partners were. The deposition seems to have been taken upon the theory that the taking of the note of John Lingenfelter, in ignorance of the existence of dormant partners, would not defeat a right of action against such dormant partners, and the purpose of the question seems to have been to prove that the note was taken in ignorance of such fact. The answer was incompetent to prove the fact of such partnership, but was competent to prove when such information was received.

The eighth and ninth questions and answers are unimportant, and need not be further noticed.

The tenth was: "State whether or not the plaintiff took from John Lingenfelter any note for the amount of the account of bill as stated in exhibit (A); and if so, describe the note, and why it was taken.

"Ans. We took a note to determine the amount of the account and the time of payment, and not to cancel the account. The note was dated May 1st, 1868, and became due October 1st and 4th, 1868, and reached us by mail on the 6th day of August, 1868."

The purpose of the question was to show that there was no agreement to take the note in satisfaction of the account. We do not think the word "describe," as used in the question, called for the contents of the note, but the object was to identify it. The date and maturity are given, but not the amount of the note. As all the partners were liable, though the note

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of one was taken, this question and answer could not injure the appellants.

We think the eleventh question and answer were proper.

The fourteenth, fifteenth, and sixteenth questions and answers show that the note of John Lingenfelter was received for the amount sued on, and was transferred to a bank, and was afterward taken up by appellees, and was sent to Fort Wayne for collection. We are unable to see why appellants should object to these questions and answers, as they strongly tended to sustain their theory of the case. They were not injured, and have no right to complain of the ruling of the court.

The seventeenth question called out a letter from Henry and Emil Lingenfelter to the appellees.

The eighteenth question related to who had charge of the correspondence of the appellees.

The nineteenth question was, whether the letter of Henry and Emil Lingenfelter had been answered, and if so, by whom. Then follows a letter written in the name of the firm, by Mr. Indig, who had charge of the correspondence of said firm.

The twentieth question was, whether such letter had been submitted to the deponent before it was mailed; and the answer was, that it had not.

The twenty-first question was, whether the deponent had ever authorized Mr. Indig to make the statement "that neither H. Lingenfelter & Bro. nor John Lingenfelter were indebted to your firm."

The answer was: "No, sir; we never authorized him to write any such letter; it was sent without our knowledge, and the first intimation we had of it was sometime after suit had been commenced."

The twenty-second question was, who had charge at that time of the finances of the firm? and the answer was, that the deponent had.

The appellants also moved to suppress the forty-fifth, forty-eighth, forty-ninth, fiftieth, fifty-first, and fifty-second questions and answers in the deposition of Emile Indig.

These questions and answers related to the letter written by H. Lingenfelter & Bro. to appellees, the answer thereto written by witness in the name of the firm, whether it was written by him with the knowledge of the firm, and whether it was submitted to any member of the firm before it was sent, and as to what the witness meant by the expression used therein, "that neither H. Lingenfelter & Bro. nor John Lingenfelter were indebted to the firm of Edward Simons & Bro." The explanation was, that when the letter was written the note of John Lingenfelter for the account sued on had been sold and negotiated to a bank. These questions and answers related to the same matters as questions 17, 18, 19, 20, 21, and 22, in the deposition of Samuel Simon, above stated.

We confess our inability to see how these questions and the answers thereto injuriously affected the appellants. The letter of H. Lingenfelter & Bro. to appellees was clearly admissible against them. The answer of the appellees thereto constituted a part of the transaction. We think it was competent for Mr. Indig to explain what he meant by the statement that neither H. Lingenfelter & Bro. nor John Lingenfelter were indebted to the appellees. We also think it was competent for appellees to show that such letter had been written without their direction or knowledge.

The letter having been written, in the name of the appellees, by one employed to act for them, the presumption would be, that it was written by them or with their knowledge, and was binding upon them. It was competent for them to show by whom and under what circumstances the letter was written.

It is also claimed that the court erred in requiring Henry Lingenfelter to answer the question, whether he had not offered to pay fifty cents on the dollar on the account sued on. It is a sufficient answer to say, that the grounds of the objection were not pointed out in the court below. The bill of exceptions states that appellants objected to the question, but

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it does not state the grounds of the objection. This is indispensably necessary to present any question for review here.

The appellants failed to prove that a judgment had been rendered on the note given by John Lingenfelser to appellees for the account sued on.

Adam H. Bittenger testified, that he was a justice of the peace, and that he had rendered a judgment against John Lingenfelser, May 3d, 1869, in favor of the plaintiffs in this suit, on a note, and that an execution was issued against John Lingenfelser, which was returned with schedule claiming exemption June 22d, 1869.

There was no objection to the admission of parol evidence to prove the judgment. The evidence offered wholly failed to show that a judgment had been taken against John Lingenfelser upon the note given by him for the account sued on. It failed to show the date or amount of the note, or that it was payable to the appellees. As we have seen, the giving of the note did not discharge the other members of the firm. If, however, a judgment had been taken on the note, it would have merged the debt and discharged the other partners. The appellants having failed to make such proof, as they might have done under the general denial, the dormant partners are not discharged.

We think the evidence very clearly shows, that Henry and Emil were the partners of their father when the goods for which this action is brought were purchased. There is no equity in the defence. The goods were purchased of appellees, and were sold by appellants, and the proceeds appropriated to their own use. The appellants are not in a favorable condition to defend this action, while they retain the money which they received for the goods purchased of appellees. We think the case was decided rightly, upon its merits.

The judgment is affirmed, with costs.

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REAM, ADM'X, v. THE PITTSBURGH, FORT WAYNE, AND
CHICAGO RAILROAD CO.

RAILROAD.—*Pleading.—Contributory Negligence.*—A complaint against a railroad company to recover for an injury resulting in death, which showed that the deceased, in company with others, was voluntarily riding upon a hand-car, on the track of the defendant, in the night time, and thus collided with a locomotive and train of the defendant, was bad, because it showed contributory negligence on the part of the deceased.

From the Allen Common Pleas.

W. G. Colerick and H. Colerick, for appellant.

DOWNEY, J.—Malinda Ream, as administratrix of the estate of Christena Ream, deceased, sued the said railroad company, alleging in her complaint, in substance, that the deceased was, before and at the time of her death, a resident citizen of Allen county; that she left her home on the 18th day of March, 1865, to visit her kindred, at Conway, in the county of Van Wert, Ohio; that on Sunday, the 19th day of said month, she was, with other young ladies, invited to ride on a hand-car, on the track of said railroad, for a distance of about four miles; that the defendant did then occasionally suffer the people living in and about that place to make such excursions on Sunday evenings, as no regular train passed over that part of said road on Sunday evenings, except the mail train; and the decedent then started with the company to make said excursion on the hand-car, all of them then well knowing that they could by ordinary care protect themselves from all danger, except from wanton injury, because from the said village east the line of the road was tangent, and the bed of the road level, for the distance of six and one-half miles, so that the head-lights of trains on the road approaching said village from the east could be plainly seen for said distance and every part of it, and because from said village west the track of said road is on a tangent line, and the road bed level, for the distance of nine miles from said village, and the head-lights on trains coming from the west could be seen at all times in the night, at said village, for said distance and every part of it, both east and

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west from said village, and every intermediate place on said road, so that the persons on the hand-car could plainly see, from every yard their hand-car passed over on the road on the said excursion, the head-lights of every approaching train, whether from the east or the west, for the distance as aforesaid; and that the party, while on said excursion, kept constant watch and ward for head-lights from trains on the road; that while on said excursion they perceived the approach of said regular train when it was six miles from them by its head-lights, and east of them, and saw it every moment afterward until it had passed the hand-car on the side of the track; that the party on the hand-car could have easily avoided and prevented collision with any train on the road on said evening, by seeing the head-lights on the trains, whether coming from the east or from the west, or by hearing the signals of bells or whistles, as the train was entering the depot at said village, or the crossing of highways, or had trains run with no more than usual speed, as the said party were careful and on their guard, and could and would have seen the head-lights and heard the signals and the noise of the running trains, if moving at their usual speed, in time to have deliberately saved themselves, by preventing any train from colliding with said hand-car; that about eight and a half o'clock on said evening on which they left the village on the hand-car, they started to return in the car to the village; the night was dark, the air was moist and heavy, and the whole party were vigilantly watching for signals of light and sound from the east and the west, and when they came within about two miles of said village, and seeing no head-lights and hearing no signals of either bell or whistle, until about four seconds before a train on said road collided with their said hand-car, when they perceived a light from the furnace of an engine on the track, too late to save themselves from the collision; that the said train was an irregular, wandering train, propelled by engine No. 140, of defendants, and attached to it were only a tender and a caboose; that the servants of the defendant who ran the train at said time were incompetent; one George King was engineer and one Hughes

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was conductor ; that the said servants were, before and at said time, running the train so recklessly, so wantonly, and with such gross negligence as to too plainly imply an utter indifference, on their part, whose property or whose lives they destroyed, in this, they knew that their train was irregular, that the night was dark, that they were running the train without head-lights, that they were driving the train at the unusual and reckless speed of forty miles an hour, and that without abating said speed they passed the depot at said village, and did not even signal their approach to said depot or the crossing of highways in its vicinity by bell or whistle, and in this manner the said train was flying along said road when it so struck and collided with the said hand-car, and thereby unlawfully killed five of the said persons in said hand-car, one of whom was the said decedent, Christena Ream, who, of the injuries thus received, languished until the 21st day of said month, when she died.

It is then alleged that she left as her heirs at law her father, Jacob Ream, of said county of Allen, and her mother, the said plaintiff; that her said father has since died intestate, at said county, leaving his widow, the said Malinda, Oscar Ream, Mary, Wilson, James, Lewis, and Charles Ream, their children and brothers and sisters of said deceased.

It is further alleged that by the statute law of the State of Ohio, in force at the time of said injury and death, the personal representatives of the deceased were entitled to an action, which statute is in the words following, to wit:

“Be it enacted by the General Assembly of the State of Ohio, that whenever the death of a person shall be caused by wrongful act, neglect or default; and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof; then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as

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amount in law to murder in the first or second degree, or manslaughter.

“Sec. 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person ; and the amount recovered in every such action, shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to the widow and next of kin in the proportions provided by law in relation to the distribution of personal estates, left by persons dying intestate ; and in every such action, the jury may give such damages as they shall deem fair and just, not exceeding five thousand dollars, with reference to the pecuniary injury resulting from such death to the wife and next of kin to such deceased person.”

And the plaintiff further avers that, by the law of said State of Ohio, the brothers and sisters of the deceased were her next of kin, and entitled under said law to the damages that may be recovered in this action.

It is also alleged that the said Christena, in her lifetime, thereby sustained damage in the sum of five thousand dollars, and the plaintiff, as such administratrix, a like sum since the death of said decedent, which has never been paid ; wherefore, etc.

To this complaint, the defendant demurred, on the ground that the same did not state facts sufficient to constitute a cause of action, and the demurrer was sustained. This ruling of the court is assigned as error. There is no brief on the part of the appellee, and counsel for appellant discuss the case wholly with reference to the question, whether the action could be brought in this State upon the Ohio statute, the injury and death having occurred in that state.

We do not deem it necessary to decide this question, as we regard the complaint bad, on the ground of the contributory negligence on the part of the deceased, which should, according to well settled rules of law, prevent her representative from maintaining the action. See the cases of *The Terre Haute and Indianapolis R. R. Co. v. Graham*, 46 Ind. 239,

Russell *et al.* v. Harrison.

The J., M. & I. R. R. Co. v. Goldsmith, 47 Ind. 43, and *Hathaway v. The T., W. & W. R. W. Co.*, 46 Ind. 25.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

RUSSELL ET AL. v. HARRISON.

SUPERIOR COURT.—*Assignment of Error.*—The Supreme Court cannot, on an appeal from a superior court, review any question which has not been raised by the assignment of errors in the general term of the lower court on the rulings at the special term.

From the Marion Superior Court.

J. Hanna, F. Knefler, and C. L. Holstein, for appellants.

PETTIT, J.—This case was tried and judgment rendered in special term, from which an appeal was taken to the general term, where the judgment was affirmed, from which affirmance an appeal was taken to this court. There was no error assigned in general term on any ruling or action of the court in special term; there was, therefore, no question legally or properly presented to the general term on the action of the court in special term, and hence the general term did not err in affirming the judgment of the special term.

This court has repeatedly held that we can only review, consider, and act upon such questions as are raised by the assignment of errors in the general term on the rulings of the special term.

The judgment is affirmed, at the costs of the appellants.

Petition for a rehearing overruled.

 Brunner *et al.* v. Brennan.

BRUNNER ET AL. v. BRENNAN.

49	98
151	502

49	98
158	672

PLEADING.—*Complaint to Subject Real Estate to Satisfaction of Judgment.*—A complaint to set aside a credit entered on a judgment by reason of a sale of property on execution, which was not the property of the judgment debtor, and to subject certain real estate to the satisfaction of the judgment, is good, though the plaintiff may not be entitled to have the credit set aside, if it shows that there is still an amount due on the judgment over and above the credit.

PRACTICE.—*Supreme Court.*—It is not the duty of the Supreme Court to examine a record in search of errors that are not pointed out.

From the Marion Circuit Court.

J. E. Heller, for appellants.

D. V. Burns, for appellee.

WORDEN, J.—Action by the appellee against the appellants. The complaint alleges, in substance, the following facts: That on June 21st, 1870, the plaintiff, Julia Brennan, recovered a judgment in that court against Brunner and Speakerworth, two of the appellants, for the sum of five hundred and twelve dollars and six cents; that she caused an execution to be issued thereon, and that by virtue thereof certain ice and ice houses were levied upon as the property of John Brunner, and purchased at sheriff's sale by the plaintiff for the sum of two hundred dollars, and that the plaintiff's attorneys executed a receipt upon the execution for the above mentioned sum; that afterward the plaintiff brought an action in the Marion Superior Court against John Brunner and Jethro Locklear to have ascertained and declared by the judgment of the court the interest owned by said John Brunner in the ice and ice houses at the time of the levy and sale; that it was determined by the judgment of the court that said Brunner had no title or interest of any kind to or in the ice or ice houses, but that the same belonged wholly to said Locklear; whereby the plaintiff lost the benefit of her purchase; that the two hundred dollars is wrongfully credited upon the judgment, which remains unpaid, excepting the sum of nine dollars and sixty-seven cents; that Speakerworth is wholly insolvent, having no prop-

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erty whatever; that the plaintiff caused another execution to be issued upon her judgment, and placed in the hands of the sheriff, who demanded of Brunner property to satisfy the same, but he failed to turn out any, and filed a schedule of his property as exempt from execution; that on February 14th, 1870, and after the indebtedness to the plaintiff was incurred, Brunner purchased of one Simeon J. Mitchell certain real estate described; that the same was paid for by moneys belonging to John Brunner, but, with a view to cheat and defraud his creditors, and especially the plaintiff, the title thereto was taken in the name of his wife and co-defendant, Caroline Brunner, who paid no part whatever of the purchase-money, and who, if she did pay any part thereof, took the title with full knowledge of the intent of said John to cheat and defraud the plaintiff by so placing the title in her name; that since the recovery of the plaintiff's judgment, said John purchased from Lee Carter a certain other piece of real estate, situate in said county of Marion, and had the same conveyed to his wife Caroline for the sole purpose of cheating and defrauding his creditors, and especially the plaintiff, which the said Caroline well knew at the time she accepted the conveyance, and for which real estate she paid no part of the purchase-money; that the conveyance of said real estate has never been placed on record, and the plaintiff is unable to give a description of the same; that the said John Brunner is not possessed in his own right or name of any other property than that set out in his said schedule, and has no property on which the execution can be levied.

There are some other allegations in the complaint unnecessary to be noticed for the purposes of this opinion. Prayer, that the two hundred dollars credit on the judgment be set aside, and that the property thus conveyed to the defendant Caroline be subjected to the plaintiff's judgment.

Speakerworth was defaulted. John and Caroline each filed separate demurrers to the complaint, assigning for cause, first, the want of sufficient facts, and, second, that several causes of action had been improperly united. These demurrers were overruled, and exception was taken. An answer of general

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denial was then filed by said John and Caroline, and the cause was submitted to the court for trial, which resulted in a finding and judgment for the plaintiff, a new trial being denied to the defendants.

The errors assigned are in overruling the separate demurrers to the complaint and the motion for a new trial.

We have not considered the second ground of demurrer assigned, for the reason that if error were committed in respect to that ground, the judgment could not, for that reason, be reversed. 2 G. & H. 81, sec. 52. Nor does the question properly arise on the demurrers assigning the want of sufficient facts, whether the court could properly strike out and annul the credit on the judgment for the two hundred dollars on the ground that Brunner had no title to the ice and ice houses which she bought at the sale upon the execution. The complaint is abundantly good with all that portion left out which relates to the sale and purchase of the ice and ice houses, and the credit therefor. It may be observed, however, upon this point, that there is no warranty in judicial sales. *Morgan v. Fencher*, 1 Blackf. 10; *The Terre Haute, etc., R. R. Co. v. Norman*, 22 Ind. 63. It would seem to follow from this that the purchaser of property at sheriff's sale stands in the situation of a purchaser of real estate who has taken a conveyance without covenant. In such case, in the absence of fraud, he can neither recover back, nor defend against an action to recover, the purchase-money, on the ground of a failure of title. *Laughery v. McLean*, 14 Ind. 106; *Cartright v. Briggs*, 41 Ind. 184; *Noonan v. Lee*, 2 Black, 499. See on the subject of failure of title to property purchased on execution, the cases of *Rocksell v. Allen*, 3 McLean, 357, and *United States v. Duncan*, 4 McLean, 607. In this State, it has been held that the purchaser of land at sheriff's sale, to which the execution debtor has no title, may recover the purchase-money of the debtor, though no fraud be imputed to him. *Preston v. Harrison*, 9 Ind. 1. See, also, *Hawkins v. Miller*, 26 Ind. 173.

Whether the authorities can all be reconciled with the general principle that in judicial sales there is no warranty, we

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will not here undertake to determine; nor do we decide whether the plaintiff was entitled to have the credit struck out in consequence of the failure of title, for the reason above given. There was a large sum due the plaintiff on her judgment after crediting the two hundred dollars, and it appears from the allegations of the complaint that neither Brunner nor Speakerworth has any property out of which anything can be made, save that which was conveyed to Caroline as alleged; and the facts alleged are abundantly sufficient to entitle the plaintiff to make her money out of that property. The demurrers to the complaint were, therefore, correctly overruled, without reference to the question of annulling the credit.

In reference to the motion for a new trial, the counsel for the appellants, in their brief, copy the reasons filed for a new trial, and then add, "The appellants insist that the court erred in the ruling on the motion for a new trial, and submit that this cause ought to be reversed." There is nothing further pointed out or suggested as to the particular or particulars in which the supposed error consisted. We are not inclined, nor does our duty require us, to wade through the record in search of errors that are not pointed out. *Bennett v. The State*, 22 Ind. 147.

The judgment below is affirmed, with costs.

KELLER ET AL. v. BOATMAN.

SUPREME COURT.—*Notice of Appeal to Co-Parties.*—Persons who have been made parties defendants in a complaint, to answer as to their interest in the subject-matter of the action, who have not appeared in the lower court, and against whom no judgment has been rendered, and who therefore cannot be affected by the judgment of the Supreme Court in such action, should not be served with notice of appeal, under section 551 of the code; and if they be made parties and notified, their names will be struck from the assignment of errors, and the costs occasioned by their being made

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parties in the Supreme Court, and by their being notified, will be against the appellants.

From the Hamilton Circuit Court.

L. Barbour and *O. P. Jacobs*, for appellants.

J. T. Dye and *A. C. Harris*, for appellee.

BUSKIRK, C. J.—The appellee commenced an action against the appellants, and several other defendants. The purpose of the action was to recover, as against Keller, the possession of a portable steam saw-mill, to foreclose a mortgage as against Keller on the said mill and certain real estate, and to be subrogated to the rights of Small in a certain mortgage given by Keller to said Small, and to have a foreclosure thereof.

The material facts were these: Robert H. Keller and Hamilton Emmons purchased of the Eagle Machine Works a portable steam saw-mill, for two thousand eight hundred dollars, for which three notes were executed by the purchasers, with appellee and appellant Small as sureties. The notes were assigned to James B. Suitt, who recovered a judgment against all the makers. The judgment was paid by appellee. Soon after the purchase of the mill, Emmons sold his interest in the mill to his co-owner, and, with an agreement on the part of Keller to pay off the notes, Keller executed to Emmons and appellee a mortgage on the mill and certain real estate to indemnify them; and to indemnify Small, Keller executed to him a mortgage on said mill, the same real estate mortgaged to Emmons and appellee, and on another tract of land.

The appellee, in his complaint, makes the following averments as to other defendants: "And the plaintiff says, that the other named defendants, John T. Wolf, Joseph Wilson, Moses W. Wilson, William Ridenour, Hugh Dickey, Henry George, Mary J. Wiseman, Robert Trimble, Ellis W. Harold, John W. Flint, and Alexander Boyer, each claim some right, claim, or interest in or to said lands and mill; and plaintiff says they, nor either of them, have any claim on said lands or mill of any kind whatever, and they are made parties to

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answer if any interest they have, or be forever barred and foreclosed."

It does not appear from the record that any of the above named defendants were served with process ; that any of them appeared and answered ; but it does appear therefrom that no judgment was rendered against them, not even for costs. Their names do not appear in the record after the complaint, except that some of them were witnesses.

Keller and Small appeared and answered. There was a trial by jury, a finding for plaintiff against Keller and Small, who moved for a new trial, which was overruled, and they alone appeal.

The court rendered a judgment in favor of appellee against Keller and Small, and foreclosed the mortgages. The appellants have had process served upon all of their co-defendants, except Moses W. Allen, William Ridenour, Ellis W. Harrold, John W. Flint, and Alexander Boyer. It is shown by affidavit, that Wilson is a non-resident of the State, that Harrold is supposed to reside in Hamilton county, Indiana, but the sheriff has returned as to him, not found ; that Flint is dead, and has no administrator ; that Boyer is dead, and George Bosell is his administrator, and resides in Tipton county, in this State.

The appellants have moved for leave to submit this cause, without notice to the above named persons.

It is provided, by sec. 551 of the code, 2 G. & H. 270, that " a part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the clerk of the Supreme Court," etc.

Are the above persons parties, within the meaning of the above section ? We think they are not. If served with process, they did not appear ; there was no judgment rendered against them. We think they have no interests in this action. No judgment having been rendered against them, they cannot be affected or bound by any judgment that may be rendered by this court. Several of the persons who were

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made parties to answer to their supposed interests, and who have been notified of this appeal, were not necessary parties to the appeal. We think that the names of all the persons above given, who were made defendants to answer to their supposed interest, should be stricken from the assignment of errors, and that all costs occasioned by their being made parties and notified, should be paid by appellants.

We are further of opinion that the cause should be submitted, and it is now accordingly submitted.

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49	104
153	510

PLEADING.—*Answer to Part of Complaint.*—An answer pleaded to the whole complaint, but which does not answer all the paragraphs of the complaint, is bad.

PRACTICE.—*Special Finding.*—*Replevin.*—A special finding in these words: "We, the jury, find that the plaintiff had a right to replevy the mill," amounts to no more than a conclusion of law, which the jury could not decide, and will not authorize a judgment for the possession of the property.

EVIDENCE.—*Married Woman.*—*Chattel Mortgage.*—A chattel mortgage alleged to have been made by a married woman and her husband, which is set out as an exhibit in a complaint for its foreclosure, and which is not denied under oath, may be read in evidence against the wife, without its execution having been proved.

SAME.—*Mortgage of Real Estate.*—So also may a mortgage made by a husband and wife upon the real estate of the husband be read in evidence against the wife, under like circumstances, without proving its execution.

PAYMENT.—*Commercial Paper Made by One for Debt of Himself and Others.*—A party liable with others, on a promissory note, who, after default in payment, paid the original note by his own negotiable paper governed by the law merchant, may, before the payment of his note, sustain an action against the other parties to the original note for money paid, etc.

PRACTICE.—*Misjoinder.*—A claim for the delivery of personal property ought not to be joined with a paragraph for money paid, but a judgment cannot be reversed for such misjoinder.

SAME.—Where no demurrer is filed to such complaint, but issues are formed

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on each paragraph, and trial had, each should be governed by the rules of law peculiar to itself; and where error intervenes under either paragraph and not under the other, the judgment, when it is capable of separation, should be affirmed in part and reversed in part.

From the Hamilton Circuit Court.

L. Barbour and *C. P. Jacobs*, for appellants.

J. T. Dye and *A. C. Harris*, for appellee.

BIDDLE, J.—This case was originally commenced in the Tipton Circuit Court, by the appellee, against the appellants and others. It was afterward transferred to the Hamilton Circuit Court, by a change of the venue.

The complaint charges, that on the 1st day of July, 1868, Robert H. Keller and Hamilton Emmons purchased of the Eagle Machine Works, of Indianapolis, a portable steam circular saw-mill, and in part payment therefor executed three joint and several promissory notes, two for nine hundred and fifty dollars each, and one for nine hundred dollars, negotiable and payable at Fletcher's Bank, Indianapolis, waiving, etc.; signed by said Keller and Emmons, principals, and by Small and the appellee as sureties. The notes were made payable to the Eagle Machine Works, and by that company afterward endorsed to James B. Suitt, who, on the 16th day of November, 1869, commenced his action on the notes in the Marion Civil Circuit Court, against the makers, and payee and endorser, and on the 7th day of December, 1869, recovered judgment against the defendants for three thousand and thirty dollars and ten cents, and costs. Execution was duly issued on this judgment to the sheriff of Hamilton county, where the appellee resided, who, on the 29th day of September, paid the debt, interest, costs, etc.

Soon after the date of the notes, Emmons sold his interest in the saw-mill to Keller, who agreed to pay off the notes, and, to secure Emmons from liability, executed a mortgage, in which his wife, Sarah J. Keller, joined, on certain real estate in Tipton county, described in the mortgage, which was duly recorded. On the 11th day of July, 1868, Keller executed a mortgage on an undivided half of the saw-mill,

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machinery, profits, etc., to Emmons and the appellee, to save them harmless from their liability on said notes ; which last mortgage was duly recorded in Tipton county, wherein the mill at the time was situated. On the 23d day of July, 1868, Keller and wife executed a mortgage to Archibald Small, on a certain described forty acres of land in Tipton county, and on the saw-mill, boiler, machinery, profits, etc., to secure Small from liability on said notes. This mortgage was also duly recorded in Tipton county.

In both of the mortgages on the saw-mill, Keller was to retain possession of it until breach of the condition.

Boatman avers in his complaint, that by the payment of the debt he became subrogated to all the rights of Emmons and Small in these several mortgages.

The complaint further states, that on the 3d day of January, 1871, Keller and his wife conveyed the real estate so mortgaged to Mitchell Hammell, and that afterward, on the 21st day of February, 1871, said Small fraudulently, and without consideration, entered full satisfaction on the record of his interest in the mortgaged property.

There are some other averments in the complaint, such as, that the plaintiff is entitled to the possession of the saw-mill, has been, and will be, put to great expense, etc., which need not be more particularly noticed now. Prayer, that the plaintiff may have his judgment against Emmons and Keller ; foreclosure of each of the mortgages ; possession of the saw-mill ; judgment against Small ; that said fraudulent entry of satisfaction be set aside ; that the lands and saw-mill be sold ; general relief, etc.

There is a second paragraph in the complaint, against Keller alone, in the ordinary form of replevin, alleging the unlawful detention of the circular steam saw-mill, engine, boiler, machinery, saws, etc., and claiming possession.

Under this second paragraph, supported by affidavit, a writ was issued from the Tipton Circuit Court to the sheriff of Hamilton county, who took possession of the property, and, upon bond given, delivered it to the appellee.

Emmons, and the wife of Keller, and other defendants, were defaulted.

Keller and Small jointly answered :

1. By general denial.
2. Setting up the judgment and proceedings in the Marion Civil Circuit Court, alleging that the appellee therein answered by a cross complaint, to which a demurrer was filed and sustained.
3. Similar to the second.

Keller answered separately :

1. That the debt was paid by the appellee's having fraudulently taken the saw-mill, etc., by means of an illegal process.
2. Substantially the same as his first.

To each of these special paragraphs of answer, separate demurrers were filed, and properly sustained, if for no other reason, because they were pleaded to the whole complaint, and contained no answer to the second paragraph.

Upon the issue of general denial, a jury trial was had in the Hamilton Circuit Court, and a general verdict of two thousand three hundred and forty-six dollars and sixty cents rendered for appellee, with a special finding in these words : " We, the jury, find that the plaintiff had a right to replevy the mill ;" and also answers to several interrogatories.

The appellants moved the court for a *venire de novo*, and grounded their motion on the defective special finding in replevin. This motion was overruled, and exception taken. They then moved for a new trial, setting out causes, which motion was also overruled, and exception taken. The court rendered judgment on the verdict and on the default against Keller and Emmons, and in favor of the appellee, for two thousand three hundred and forty-six dollars and sixty cents, for the possession of the saw-mill, machinery, etc.; the foreclosure of the several mortgages; that the property be sold to pay the judgment; the surplus, if any, paid over; for execution, etc.

The judgment for the possession of the property in favor of

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the appellee is erroneous. The verdict does not authorize it. The words in the verdict: "We, the jury, find that the plaintiff had a right to replevy the mill," amount to no more than a conclusion of law, which the jury could not decide. They express no fact on which such a judgment could be rendered. Besides, the evidence is all before us in a bill of exceptions, and there is nothing in it to sustain the appellee's right to the possession of said mill, under the second paragraph of the complaint.

We have thus disposed of errors one, two, three, four, five, and seven, leaving only the sixth yet to consider. This ruling also disposes of the instructions asked and refused, which refer to the second paragraph of the complaint.

The sixth assignment of error is, that "the court erred in overruling the appellants' motion for a new trial."

Certain other instructions to the jury were asked by the appellants, and refused by the court. This ruling they claim to be erroneous. The instructions were as follows:

"4. A chattel mortgage alleged to have been made by a married woman and her husband cannot be foreclosed as against her, until proof has been made that she signed and executed the same."

There is no error in refusing this instruction. It does not appear that the wife had any interest in the property. The mortgage was set forth in the complaint, and filed with it as an exhibit. It was not denied under oath, and was therefore properly read to the jury without proving its execution.

Instruction 5 is confused, and so manifestly wrong that it requires no further notice.

"6. The plaintiff can in no event recover of the defendants Keller and Small any greater sum than he had actually paid on debt or demand for which they were legally liable before the 16th of March, 1871, the date of the commencement of this suit."

This instruction was properly refused. The evidence shows us that the appellee paid the liability arising on the original notes by his own negotiable paper, governed by the law mer-

chant, running twelve months from September 29th, 1870 ; it was therefore not due March 16th, 1871. This paper, although not an "actual" payment, is a discharge of the parties to the original notes, and therefore was a sufficient payment by the appellee to enable him, as to that point, to maintain this suit. It was equivalent to a payment. This rule has been so held by this court since the decision of *Pitzer v. Harmon*, 8 Blackf. 112. See, also, *Bennett v. Buchanan*, 3 Ind. 47. The instruction is also wrong, because it assumes the 16th of March, 1871, as the date of the commencement of the suit. If that date was important to the case, it was necessary to prove it to the jury, and not assume it as a fact in the instruction.

The point arising on instruction 7 is decided by the ruling just made on instruction 6.

"8. The original notes given by plaintiff, with defendants Keller and Small and Emmons, if paid by Boatman, were satisfied and discharged, and no action will lie against the defendants Keller and Small, by Boatman, thereon."

Boatman does not sue upon those notes ; his action is founded on "money paid" in the discharge of the notes, as surety upon them. This instruction, therefore, is wholly irrelevant, and was rightly refused.

Holding the instructions, as above asked for by the appellants and refused by the court, to be wrong, necessarily decides that the instructions which were applicable to the first paragraph of complaint, and given by the court on its own motion, are right. We need not, therefore, examine them separately.

The court, over the objection of the appellants, allowed the appellee to read as evidence to the jury a certified copy of the mortgage on lands, made by Keller and wife to Small, without proving its execution. The mortgage was set out in the complaint, and properly made an exhibit. There was no answer filed denying its execution on oath, and we have just decided that to so read the chattel mortgage was not error. But it is claimed, that as against the wife who has an interest in the lands of her husband, to read this mortgage to the jury

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without proving its execution by her, was erroneous. The point thus made has never been fully decided by this court, as far as we are now aware. Some light, however, is thrown upon the question in *Harlan v. Edwards*, 13 Ind. 430. This court, however, has decided that the wife in such cases has a right to defend separately from her husband. *Bowers v. Van Winkle*, 41 Ind. 432. And we are supported in this view by the decisions of other states. *Coolidge v. Parris*, 8 Ohio St. 594.

The reason of the rule that no decree could be taken against the wife on default in such cases was, that the disability of the coverture prevented her from defending in her own right separately from her husband. *Comley v. Hendricks*, 8 Blackf. 189. But this was before the enactment of our code.

Since the disability of the wife to defend, separately from her husband, in her own right has been removed, and since this court has decided that she can so defend on equal terms with any other defendant, we see no reason in keeping up a distinction in the practice of the courts in reference to her rights. When the reason fails, the rule should fail. We think this is the true interpretation of the code, and supported by the decisions. 2 G. & H. 41, secs. 8, 9, and cases above cited. If we are correct in this reasoning, it conducts us to the conclusion that the court did not err in allowing the mortgage to be read to the jury as evidence against the wife.

There is a misjoinder of causes of action in the complaint. A claim for the delivery of personal property ought not to be joined with a paragraph for money paid. The judgments are inconsistent, and unlike in kind. Such a misjoinder, however, is not a ground on which a case can be reversed in this court, under any circumstances. 2 G. & H. 81, sec. 52.

The appellants did not demur to the complaint. Issues were formed and trial had on both paragraphs. In such cases, we think each paragraph should be governed by the rules of evidence, instructions to the jury, and form of the verdict, peculiar to itself; and where error intervenes under either paragraph, and not in the other, the judgment, when it is

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capable of separation, should be affirmed in part, and reversed in part.

This judgment, therefore, as to all that part which decrees possession of the saw-mill and machinery to the appellee, is reversed; in all other respects, it is affirmed, at the costs of the appellee.

Petition for a rehearing overruled.

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PLEADING.—Departure.—A departure in pleading is when a party quits or departs from the case or defence which he has first made and has recourse to another.

SAME.—Where to a complaint upon a promissory note an answer is filed setting up a failure of consideration, a reply that there had been differences in reference to the consideration, but that they had been compromised and settled, by the defendant agreeing to pay, and the plaintiff to receive, a certain sum, less than the face of the note, is not a departure.

NEW TRIAL.—Motion.—Insufficient Complaint.—A defect in the facts of a complaint does not constitute a reason for a new trial.

From the Marion Superior Court.

J. Hanna and *F. Knefler*, for appellants.

L. Ritter, *C. B. Walker*, and *E. F. Ritter*, for appellee.

BUSKIRK, C. J.—The first and principal error complained of is the overruling of appellants' demurrer to the second paragraph of appellee's reply. This was an action to foreclose a chattel mortgage executed to secure the payment of two promissory notes for three hundred dollars each, executed by appellants, and payable to appellee. The third and fourth paragraph of appellants' answer averred the existence of a

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state of facts showing a failure or want of consideration for the notes sued on. The second paragraph of the reply was as follows:

“For further reply, said plaintiff says that on the 29th day of April, 1872, all the matters of controversy between said parties, plaintiff and defendants, as set out in the third and fourth paragraphs of said answer, were fully settled to the satisfaction of all said parties, as shown by an agreement in writing, a copy of which is herewith filed; wherefore,” etc.

The agreement was as follows:

“This indenture witnesseth, that whereas, on the 13th day of March, 1871, E. B. Carter, of Marion county, of the State of Indiana, sold to James H. Kimberlin and Henry Speece, of said county, his tile machine, shedding, etc., the consideration of which is shown in two promissory notes of the above date, one due on the 25th of December, 1871, and the other due on the 31st of May, 1872; and whereas a difference exists between said parties in reference to said contract, it is agreed that, as a compromise, said Carter will take seventy-five dollars for the first note and the the interest accrued thereon, said Kimberlin and Speece agreeing to pay twenty per cent. interest per annum on the second note until paid. This agreement is not to make an extension of time on said notes.

“Witness our hands and seals, this 29th day of April, 1872.

“E. B. CARTER, [Seal.]

“J. H. KIMBERLIN, [Seal.]

“WM. H. SPEECE, [Seal.]”

The appellants demurred to the reply, upon the grounds that it did not contain facts sufficient to constitute a defence to the answer, and because it was a departure from the complaint; but the demurrer was overruled, and the appellants excepted.

It is claimed by counsel for appellants that the second paragraph of the reply is a departure from the complaint.

A departure in pleading is when a party quits or departs from the case or defence which he has first made, and has recourse to another.

In Moak's Van Santvoord's Pleadings, 719, it is said:

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“Under the code, as under the old practice, the plaintiff is not permitted to quit or depart from the case made by him in his complaint. The reply may allege new matter ‘not inconsistent with the complaint.’ It is to be observed, however, that matter which maintains and fortifies the declaration was not a departure; nor would such matter be ‘inconsistent,’ under the code.”

The complaint sought a recovery upon certain notes. The third and fourth paragraphs of the answer set up as a defence to the action that the consideration of the notes had failed. To this the appellee replied, by way of estoppel, that there had been differences in reference to the consideration of the note, but that such differences had been compromised and settled, whereby the appellants had agreed to pay and the appellee to receive seventy-five dollars on the first note and the interest accrued thereon, and to pay the whole of the second note with twenty per. cent. interest thereon until paid. These averments maintained and supported the complaint, for they showed a right of recovery on both notes, though for a diminished amount. The recovery was had upon the notes. The agreement fixed the amount of the recovery, and it having been made subsequent to the execution of the notes, and having settled and compromised the matters set up in the third paragraph of the answer, it estopped the appellants from relying upon such defence. It is very obvious that the reply was not a departure. The agreement did not give the right of action, but regulated and determined the measure of damages. It simply showed that the appellants were entitled to a credit upon the first note. *Shirts v. Irons*, 47 Ind. 445; *Sparks v. Clapper*, 30 Ind. 204. The court committed no error in overruling the demurrer to the second paragraph of the reply.

It is insisted in argument that the complaint is defective for not averring that the notes were due. See *Green v. Louthain*, *post*, p. 139. There was no demurrer to the complaint in the court below, nor was it assigned for error in the general term that the complaint did not contain facts sufficient to constitute

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a cause of action. A defect in the facts of a complaint does not constitute a reason for a new trial.

It is claimed that a new trial should have been granted because the court excluded evidence of the matters set up in the third paragraph of the answer. There was no error in this. The court, by overruling a demurrer to the second paragraph of the reply, in effect, held that appellants were estopped by their agreement to rely upon such defence. Such ruling being correct, the court was bound to exclude proof of the matters that the appellants were estopped from relying upon.

There is no error in the record.

The judgment is affirmed, with costs.

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49	114
148	288
149	289

ADMINISTRATOR AS MORTGAGEE.—*Duties and Disabilities of.*—*Widow.*—An administrator, holding a mortgage on the lands of his decedent, foreclosed his mortgage and purchased the lands at sheriff's sale, pending his petition in the proper court to sell all but the widow's interest in said lands to pay the debts of the estate, there being no other liens against the lands, and the personal estate, with the two-thirds of the lands, being ample to pay all the debts.

Held, that the widow could avoid the sale.

ADMINISTRATION.—The personal estate of a decedent is the primary fund for the payment of debts, unless a different provision be made by the will of the decedent.

SAME.—*Widow's Rights.*—A widow who joined with her husband in his lifetime in a mortgage of his lands has a right to have the personal estate and the residue of the decedent's real estate applied, as far as applicable, to the payment of the mortgage debt, before her interest, as widow, in such lands is subjected to sale.

From the Jackson Circuit Court.

D. H. Long, B. E. Long, and F. T. Hord, for appellant.

B. H. Burrell, for appellees.

WORDEN, J.—Complaint by the appellant against the appellees, to set aside a sheriff's sale of real estate. Demurrers to the complaint, for want of sufficient facts, sustained, and exception. Final judgment for defendants. The error assigned brings in review the ruling on the demurrers.

We take from one of the briefs of the appellant the following statement of the facts alleged in the complaint, which, upon comparing it with the complaint, appears to be correct:

“This is an action by appellant against appellees, on a complaint that charges substantially the following facts: that the appellee Henry G. Smith instituted an action in the Jackson Circuit Court against appellant and his co-appellees, to foreclose a mortgage executed by appellant and her husband, Charnel Hunsucker, in his lifetime, on certain real estate described in the complaint, to secure a debt of the said Charnel Hunsucker, now deceased. Appellant was defaulted, and judgment was rendered in favor of H. G. Smith on the 13th day of February, 1873, for three thousand eight hundred and sixty dollars and twenty-two cents, and for foreclosure of the mortgage and sale of said property; that prior to the commencement of said action by H. G. Smith to foreclose the mortgage, said Charnel Hunsucker had departed this life, and said Henry G. Smith was, on the 1st day of October, 1872, duly appointed his administrator; that as such administrator, on the 8th day of November, 1872, he filed his inventory, showing that the personal assets amounted to three thousand three hundred and seventy-eight dollars and six cents; and, on the 8th day of November, 1872, prior to commencing said suit, said administrator filed his sale bill, showing sales of personal property amounting to three thousand three hundred and thirty-one dollars and three cents; and on the 13th day of November, 1872, H. G. Smith, as administrator, filed his petition in the court of common pleas of Jackson county, to sell the real estate of said Charnel Hunsucker, deceased, for the purpose of creating assets for the payment of the debts of the decedent; notice thereof was duly given, and he procured an

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order for the sale of said real estate of said deceased for said purpose ; that all of said proceedings were had before H. G. Smith had sued to foreclose his mortgage, and before his judgment thereon ; that the real estate of said decedent included in the mortgage was of the value of five thousand dollars ; that two-thirds thereof, which was ordered to be sold by the court to pay debts on petition of H. G. Smith, as administrator as aforesaid, was of the value of three thousand three hundred dollars, and would have sold for that money. This sum, with the personal assets already in his hands as administrator, would make the assets in his hands amount to six thousand six hundred and thirty-one dollars ; that there was no other mortgage or lien on the land ; the only lien upon it was the mortgage above mentioned, of said Smith, who was the administrator ; that the expenses of last sickness and the funeral expenses of said decedent amounted to one hundred dollars, and the expense of administering would not exceed two hundred dollars ; that the debt of said Smith, with interest, was three thousand nine hundred and seventy dollars ; these were the only preferred claims, making a total of four thousand two hundred and seventy dollars ; and after paying said Smith's indebtedness, and all preferred claims, there would have been a residue of two thousand three hundred and sixty-one dollars to be applied to the payment of general debts of said estate, and the same would have been amply sufficient to pay said debts, without selling the interest of this appellant in the land, and the estate would have been perfectly solvent ; that Char-nel Hunsucker died, leaving his widow, and his children, John E., Julia A., and Wyona Hunsucker, the children being minors ; that after said Smith had been appointed administrator, and as such had filed his inventory and sale bill, and after he had procured an order of said court of common pleas to sell two-thirds of said land to pay the debts, instead of proceeding to sell under said order, as he was in duty bound to do, he then brought suit as aforesaid to foreclose his said mortgage ; and after the rendition of the judgment, and during the same term of court, without leave from the court therefor, on

the 22d day of February, 1873, he caused the clerk to issue an order of sale on his said judgment of foreclosure; and, on the 22d day of March, 1873, said land was all sold by the sheriff, and said Smith became the purchaser at said sale for three thousand six hundred dollars, and the sheriff gave him a certificate of sale; that as the widow of said decedent, appellant was the owner of one-third of all said real estate in fee simple; that it was the duty of said Smith, as administrator, to apply the proceeds of the personal estate, after the expense of last sickness and funeral expenses, and the expense of administration, to the satisfaction of his said mortgage; that there was no other mortgage or lien against said real estate; that said mortgage was foreclosed, and sale made, for the fraudulent purpose of depriving appellant of her title in said real estate; and if said sale is sustained, her rights in said land will be barred; that for want of means, appellant is unable to redeem said land from said sale; that if the personal assets had been applied on said debt, as it was the duty of the administrator to have done, appellant could have paid the residue, which she was willing and ready to do; that said Smith procured said sale to be made under the circumstances, that he might purchase the land for less than its real value, and to secure to himself the interest of appellant in the land; that as administrator it was his duty to regard the interest of his trust, and not to sacrifice the same; and he had no right to sell said land under said order of sale, or to purchase the same. And appellant demands that the sale be declared void, and that it be set aside, and that the certificate of sale be set aside, and demands all general and proper relief."

We are of opinion that the plaintiff was entitled to relief on the facts stated, and therefore that the court erred in sustaining the demurrers to the complaint. The purchase of the property by Smith for his own benefit, though at his own sale, cannot be upheld. He was a trustee, acting in a fiduciary capacity; and it was his duty, as administrator, to make the land bring the best price that could be obtained, while it was

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his interest as an individual to purchase it as cheaply as possible. His duty and his interest were directly antagonistic.

This question was fully considered in the case of *Martin v. Wyncoop*, 12 Ind. 266, and we see no reason to modify anything that was decided in that case. If this were the only point in the case, the sale would not be absolutely void, but voidable merely, and the appellee would have the option of having the experiment of another sale. There are, however, other questions involved.

It will be seen from the allegations of the complaint, that the sale bill of the personal property of the estate of the deceased amounted to over three thousand three hundred dollars, and that the personal property and two-thirds of the land were sufficient for the payment of all the debts, including Smith's.

The personal estate is the primary fund out of which all debts should be paid, unless some different provision is made in the will of the deceased; and the widow has the right to have it thus applied, as far as it will go. *The State, ex rel. Lockhart, v. Mason*, 21 Ind. 171; *Clarke v. Henshaw*, 30 Ind. 144; *Newcomer v. Wallace*, 30 Ind. 216.

The widow also had the right to have the two-thirds of the land sold before selling the third belonging to her; and if the two-thirds, together with the personal estate, should be insufficient to pay Smith's debt (that being the only lien on the land by way of judgment or mortgage), after payment of the expenses of administration, and the expenses of last sickness and funeral expenses, her third could not be sold at all. Such liens are to be paid before general debts, and after expenses of administration, and expenses of last sickness, and funeral expenses. 2 G. & H. 516, sec. 109.

Although Smith has obtained a judgment of foreclosure against the widow and heirs, it is his duty as administrator of the estate, and she has the right to require him, to make his claim out of other assets, personal and real, if he can do so after the payment of such expenses above named as have preference, and thereby save to her the third of the land to which she would be entitled except for the mortgage.

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The demurrers on the part of the heirs were also improperly sustained. Their legal interest lay in having the widow's third sold to pay the mortgage, whereby their distributive shares might be increased.

The judgment below is reversed, with costs, and the cause remanded; with instructions to the court below to overrule the demurrers to the complaint.

THE TOLEDO, WABASH, AND WESTERN RAILWAY CO. v.
HARRIS.

RAILROAD.—Pleading.—Contributory Negligence.—A complaint against a railroad company for negligently killing cattle must negative the existence of contributory negligence on the part of the plaintiff.

SAME.—A complaint against a railroad company for killing cattle, on the ground of the road's not being fenced, which alleges that the cattle came upon the road at a point where it was not securely fenced, and were there injured by being run over, etc., is sufficient.

WITNESS.—Cross-Examination.—The cross-examination of a witness must be limited to the matters about which he has testified in chief.

SAME.—Impeachment.—Where a witness, on cross-examination, is asked certain questions as a foundation for impeachment, and it is proved by another witness that he had made certain material statements denied by him, he may be recalled and permitted to explain the nature, circumstances, meaning, and design of what he is proved elsewhere to have said, but perhaps not merely for the purpose of again denying the making of the statements imputed to him, though this will not be sufficient cause for the reversal of the judgment.

From the Carroll Circuit Court.

W. Z. Stuart and J. H. Gould, for appellant.

DOWNEY, J.—Suit by the appellee against the appellant. The complaint states, "that, on or about the 16th day of April, 1868, the defendant unlawfully and carelessly wounded, injured, and killed two work oxen of the plaintiff, by wrongfully and carelessly running against and over them a train of

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cars, which said cars were then and there running upon the track and road of said defendant, within the county of Carroll, and State of Indiana. The said cattle came on said railroad track at a point therein where said railway was not securely fenced, and were then in charge and under the control of certain employes and agents of said defendants; and then and there and thereby said defendants became and are indebted to said plaintiff, by means of said wrongful and careless destruction of said cattle, in the sum of two hundred dollars, which said amount is due, and which said defendant refused to pay, although often requested so to do. Wherefore," etc. A bill of particulars is filed with the complaint, in which the claim is stated as follows: "To two work oxen, injured and killed, \$200.00."

Answer: 1. A general denial.

2. Set-off for five hundred cords of wood piled up along the railroad in Carroll county, Indiana, burned by the said plaintiff, fifteen hundred dollars.

3. That the oxen were breachy, and broke over the fence which the railway company had caused to be constructed at the place where the cattle got on the track, etc.; that the company employed the plaintiff to build the fence on both sides along the line of her road at the place aforesaid, from cattle-guard to cattle-guard; that the plaintiff built the fence and the company paid him therefor; that the plaintiff was fully advised of the character of the fence, and the breachy and vicious habits of one or both of said oxen; and that, notwithstanding the premises, he carelessly, negligently, and without regard to the safety of his cattle, placed the said oxen in a field alongside the railway, and separated from the same by said fence, etc., and thus the oxen broke in, etc., and came in contact with the locomotive, etc. Wherefore, etc.

4. That the plaintiff was in the habit of laying down the fence, etc., which was built by the plaintiff, etc., and had gates and bars therein, which plaintiff was in the habit of leaving open; and at the time in question the plaintiff left the fence

open over night, and the said cattle got on the track thereat, and were injured, etc.; that the place was securely fenced, etc.

Reply in denial of the special paragraphs of the answer. Trial by jury, and general verdict for the plaintiff, with answers to several interrogatories propounded to the jury at the request of the defendant. Motion for a new trial, for judgment on the special findings, and in arrest of judgment overruled, and final judgment for the plaintiff.

Errors assigned in this court:

1. The complaint does not state facts sufficient to constitute a cause of action.
2. The court erred in overruling the motion for a new trial.
3. In refusing to render judgment for the defendant on the special findings.

It is difficult to determine what we are to understand from the complaint. It was intended either as a complaint for the negligent killing of the cattle, or as seeking to recover on the ground that the railway was not securely fenced. But it is difficult to say which. As a complaint for the negligent killing of the cattle, it is defective, because it does not negative the existence of contributory negligence on the part of the plaintiff. *The Indianapolis, etc., R. R. Co. v. Robinson*, 35 Ind. 380, and cases cited. The part of the complaint relating to the railway's being unfenced is as follows:

"That said cattle came on said railroad track at a point therein where said railway was not securely fenced, and were there in charge and under the control of certain employes and agents of said defendant," etc.

It is not very easy to perceive why it was stated in this part of the complaint that the cattle "were there in charge and under the control of certain employes and agents of the defendant," or what effect that statement can have in the cause. It is alleged in the complaint that the cattle came on the railroad track at a point where the road was not securely fenced, and that they were there injured by being run over by the locomotive, etc. With some hesitation, we hold that the complaint is sufficient under the statute.

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Under the second error assigned, it is urged, in the first place, that the evidence was not sufficient to justify the verdict of the jury. It appears that the railroad runs through the lands of the plaintiff east and west; that his house and barn are on the north side of the road; that the road was fenced on both sides securely, by a fence built by the plaintiff himself, at the instance of the company; that in the fence on the north side of the railroad there was a gate, and in the fence on the south side a gap; that on the evening prior to the injury, the oxen injured, with two others, were turned into the plaintiff's land on the south side of the railroad, and the gap was closed up; that the plaintiff's land adjoins land of one Gilliford lying on the east of the plaintiff's land; that there was no fence between the lands of the plaintiff and those of Gilliford; that the fence along the railroad on Gilliford's land had been thrown down in several places; that the first cattle-guard east of plaintiff's place was somewhere on the land of Gilliford, and the fence joining up to it defective; that the oxen were injured by a train passing in the night, on the evening of which they were turned in the land south of the railroad; that on the next morning their tracks were seen up at the place where the fence was down on Gilliford's land, and that the fence south of the railroad on the plaintiff's land was found thrown down, or partly thrown down, the next morning. There was some evidence tending to show that one of the oxen was breachy, and other evidence the other way. It is apparent, from this summary of the evidence, that the cattle may have gone on the road from the lands of Gilliford, or they may have got on the road by going over the fence on the plaintiff's land, where it was found partly thrown down, or some of them may have gone on at one place and some at the other. Had there been a sufficient fence and cattle-guard at the line between the lands of the plaintiff and those of Gilliford, it would be pretty clear that the cattle got on the road through the fence on the plaintiff's land. But this does not appear. We are not prepared to disturb the judgment upon this question of fact.

The defendant offered to prove, by a cross-examination of

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one of the plaintiff's witnesses, that the plaintiff had been in the habit, during the fall before the happening of the injury in April, of pasturing these cattle on the way of the company through the plaintiff's farm, whereby the cattle had acquired the habit of grazing within the railway fences. The court refused to allow the examination. Two objections were made to it; first, that it was immaterial, and, second, it was not proper on a cross-examination. It seems to us that the ruling was right on both grounds. That the cattle had depastured on the way of the company before, might show that they would probably go there again for that purpose, but would not tend to show whether they went by one route or by the other. A cross-examination must be limited to the matters about which the witness has testified in his examination in chief. *The Indianapolis, etc., R. W. Co. v. Ferguson*, 42 Ind. 243.

The defendant, during the cross-examination of the plaintiff, asked him certain questions as a foundation upon which to impeach him, by proving, by another witness, that he had made a certain material statement denied by him, and accordingly did prove that he had made such statement. Thereupon the court allowed the plaintiff, against the objection of the defendant, again to be called to the stand, and to repeat his denial of having made the statement sworn to by the defendant's witness. This was made a ground of the motion for a new trial. We think that there is no doubt that a witness, under such circumstances, may be recalled, and may "explain the nature, circumstances, meaning, and design of what he is proved elsewhere to have said." 1 Greenl. Ev., sec. 462. Perhaps the court should not allow the witness sought to be impeached to be re-examined merely for the purpose of again denying the making of the statement imputed to him. But we cannot think the allowance of this by the court is such an error as should reverse the judgment.

The third alleged error is not insisted upon in the brief of counsel.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

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124	17
49	124
157	584

CRIMINAL LAW.—Forgery.—Intent to Defraud.—On the trial of a defendant on an indictment for forgery, the intent to defraud may be inferred from the facts and circumstances proved in the cause.

SAME.—Evidence.—Part of Conversation.—On the trial of a criminal cause, where a conversation, part of which is admissible in evidence, contains admissions tending to show that the defendant was charged with, or was guilty of, a similar offence before, the whole conversation may be given if it cannot be separated, but the jury should be instructed that the admissions should not be considered for any purpose connected with the guilt or innocence of the defendant, or the extent of punishment, if found guilty.

SAME.—Character of Accused.—The law invests every person accused of crime with a presumption in favor of good character, and the State cannot offer evidence to impeach such character until the accused has put his general character in issue, by offering evidence in support of it.

SAME.—Impeachment of Witness.—In a criminal cause, a witness cannot be impeached or sustained by proof of general moral character.

SAME.—Argument of Counsel.—Where a defendant in a criminal cause has not produced any evidence to sustain his general reputation and moral character, it is improper for counsel to argue to the jury that his failure to do so may be considered against him.

SAME.—Practice.—Bill of Exceptions.—In a criminal cause, where a bill of exceptions is signed and filed during the term, and it shows that the exceptions were taken at the time of the ruling, and that time was given "until now" to file the bill, it will be properly in the record.

From the Wayne Circuit Court.

H. C. Fox and *D. W. Mason*, for appellant.

C. A. Buskirk, Attorney General, *D. W. Comstock*, Prosecuting Attorney, and *W. A. Bickle*, for the State.

BUSKIRK, C. J.—George W. Williams and Robert B. Fletcher were jointly indicted in the court below for having forged a certain mortgage, a copy of which is set forth at full length in the indictment, and appears in the record.

The indictment consisted of two counts. In the first, it was charged that the mortgage was forged with the intent to defraud Peleg Williams, whose name was charged to have been forged. In the second, it was charged that the forgery was committed with the intent to defraud John C. Tracy and Samuel Bing-

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ham. The appellant's motion to quash the indictment was overruled, and an exception taken, but such ruling is not assigned for error.

A separate trial was demanded, and the prosecuting attorney elected to try the appellant first. The cause was tried by a jury, and the defendant was found guilty as charged in the second count, and sentenced to the state prison for three years, and fined one hundred dollars. The court, over a motion for a new trial, rendered judgment on the verdict.

The error assigned calls in question the action of the court in overruling the motion for a new trial.

The causes relied upon for a new trial will be considered in the order in which they are discussed by counsel for appellant.

This leads us to consider the seventh, eighth, and ninth instructions given by the court of its own motion, and as they relate to the same subject, they will be considered together.

These instructions were in these words:

"7. If the evidence convinces you, beyond a rational doubt, that at some time within two years, George W. Williams falsely wrote the name of Peleg Williams and Belinda Williams to the mortgage set out in the indictment, without their knowledge or consent, with the intent to defraud said Peleg Williams, and if the evidence convinces you beyond a rational doubt that the defendant, Robert B. Fletcher, afterward, knowing this, did, in this county, falsely acknowledge the said mortgage by signing his name to the acknowledgment of said mortgage, as set out in said indictment, without the knowledge or consent of said Peleg Williams and Belinda Williams, Robert B. Fletcher would be guilty of forgery, as charged in the first count of the indictment, and the jury should bring in a verdict of guilty.

"8. If the evidence convinces you, beyond a rational doubt, that these things were done to defraud and cheat John C. Tracy and Samuel Bingham, you would be warranted in finding Robert B. Fletcher guilty as charged in the second count of the indictment.

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“ 9. The intent with which the act was done, if done at all, may be inferred from all the circumstances proved.”

The argument of counsel for appellant, in opposition to the foregoing instruction, may be reduced to the following propositions :

1. In a criminal case, all the facts constituting the offence charged must be established by the evidence beyond a reasonable doubt, and the jury are the exclusive judges as to whether this is done or not.

2. The facts being for the jury in a criminal cause, the court cannot, in giving instructions, assume that a material fact exists or has been proved at the trial.

3. That the crime of forgery consists of a physical act and a criminal intention.

4. That the intent to defraud the person charged must be proved as a fact, and cannot be inferred from the other facts and circumstances proved in the cause.

The first three propositions undoubtedly contain a correct enunciation of the law, but we are very clearly of the opinion that the fourth is incorrect. The wrongful intent is the essence of every crime, but its existence can only be established from the admissions of the accused party, or from the facts and circumstances proved, to establish the criminal act. The intent to defraud may be presumed from the general conduct of the defendant; and if the necessary consequences of the previous acts be to defraud some particular person, the jury may convict, notwithstanding that the person states his belief on oath that the prisoner did not intend to defraud him. *Roscoe Crim. Ev.* 561 ; *Regina v. Hill*, 8 C. & P. 274.

If the act done is a violation of law, and is not done under a mistake of fact, the criminal intent will be inferred, although the person doing the act believes that the act was done in such a manner as not to amount to a violation of law. *Squire v. The State*, 46 Ind. 459 ; *Marmont v. The State*, 48 Ind. 21.

Intent is an inference of law. 2 Bishop Crim. Law, sec. 598.

The specific intent is sustained, in matter of law, by any.

proof which establishes the forgery, even though in fact the prisoner's intent was different. 2 Bishop Crim. Proced., sec. 422.

We think the court committed no error in giving the instructions set out above.

The sixteenth and seventeenth instructions are complained of, and are as follows :

“ 16. George W. Williams, when upon the stand as a witness, was permitted to give in evidence any statements made by Fletcher in conversation with him, in relation to the forgery charged in the indictment. If there was anything in such evidence tending to show that Fletcher was charged with, or was guilty of, forgery before that time, it would be legitimately before the jury, simply as being a part of that or those conversations, and cannot be withdrawn from the consideration of the jury. It is not competent, however, to prove, as an isolated fact, that Fletcher had at any time before been guilty of, or charged with the commission of any crime, as a circumstance to prove that defendant was guilty of the crime charged.

“ 17. With the exception of the testimony of Williams, as alluded to above, there is no testimony whatever tending to show that Fletcher was ever guilty of, or charged with, another crime.”

Taking the sixteenth and seventeenth instructions together, they, in effect, instructed the jury that it appeared from the admissions of the appellant, detailed in the conversations had between him and Williams in reference to the crime charged, that the appellant had been guilty of, or charged with, the commission of other and distinct crimes ; that such admissions were legitimately before them, and “ could not be withdrawn,” but that they were not competent to prove, as an isolated fact, that Fletcher had at any time before been guilty of, or charged with, the commission of any crime, as a circumstance to prove that defendant was guilty of the crime charged in the present indictment.

It is quite obvious, that the latter portion of the instruction is correct. It is firmly settled, that the evidence in a crimi-

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nal trial should be strictly confined to the crime charged. The sole and exclusive subject of inquiry should be, whether the accused was guilty of the crime charged. If innocent of such charge, he is entitled to an acquittal, although he may have committed many other crimes of which he had gone unpunished.

The thirteenth sec. of art. 1 of our state constitution provides, that "in all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offence shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor." 1 G. & H. 29.

It is worthy of notice, that the words "offence" and "accusation" are used in the singular number, thus importing that separate and distinct crimes cannot be charged in the same indictment. It has, however, been decided, that felonies belonging to the same class, and growing out of the same transaction, may sometimes be joined in different counts in the same indictment. *McGregor v. The State*, 16 Ind. 9; *Griffith v. The State*, 36 Ind. 406.

The evident purpose of such constitutional provision was to guard and protect the rights of a person accused of crime, and to prevent him from being prejudiced in the defence of one crime by evidence tending to prove that he had been guilty of another and distinct crime.

Inasmuch as the admissions constituted part of conversations which were relevant, they were properly admitted in evidence, but the court should have charged the jury that they were admitted solely because they were so connected with conversations that they could not be separated, and that they were not to be considered for any purpose connected with the question of the guilt or innocence of the appellant, or of the extent of punishment, if found guilty. The court having charged the jury that such admissions were "legitimately in evidence," and "could not be withdrawn," the jury must have under-

stood that they were to be considered for some purpose, though they were told that they were not to be considered in determining whether the appellant had committed the crime charged in the indictment. If they were not competent for such purpose, they were not competent for any, for that was the sole subject of inquiry.

We think the error in the instruction consisted in telling the jury that such admissions were "legitimately in evidence," and "could not be withdrawn." Inasmuch as the jury were charged that such admissions were "legitimately before them," and "could not be withdrawn," and as they were charged that they were not to be considered in determining the guilt of the defendant, the jury may have understood that they were to be considered in fixing the punishment, and may have so considered them.

The court should have expressly withdrawn such admissions from the consideration of the jury, and charged them that they were not to be considered for any purpose of the trial.

Upon the trial of the cause below, the defendant offered no evidence of his general character, but chose to rest upon the presumption which the law indulged in his favor. He went upon the stand as a witness, and testified in his own behalf. After he had closed his evidence, the State introduced a witness who, in answer to a question propounded to him, testified that he knew the general character of appellant, and that it was bad. The matter is thus stated in the bill of exceptions: "To each and every of said questions, before the same were answered, the defendant then and there objected, for the reason that the defendant had offered no testimony touching his general reputation, nor put the same in issue, and that if such evidence was offered for the purpose of discrediting him (said defendant), as a witness, the same should be confined to general reputation for truth and veracity."

The law invests every person accused of crime with a presumption in favor of good character, and the State cannot offer evidence to impeach such character until the accused has put

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his general character in issue by offering evidence in support of it. The presumption in favor of good character continues, and must be indulged, as long as the accused rests upon such presumption; but when he abandons the shield which the law has thrown around him, and attempts by affirmative evidence to prove, as a fact, that his general character is good, he opens the door for the admission of evidence on the part of the State to prove that his character is bad.

The law also indulges a presumption in favor of the good character of witnesses, and the party producing them cannot offer evidence in support of such character until the adverse party puts such character in issue in some of the modes known to the law.

In the case of a defendant, he must put his character in issue, but in the case of a witness, the adverse party must put his general character in issue.

These were familiar principles, well known to the profession prior to the passage of the act of March 10th, 1873, which gave to a defendant in a criminal cause the privilege of testifying in his own behalf. We are required, for the first time, to determine what changes, if any, have been produced in the rules of practice by the passage of said act. Prior to such enactment, the rights of a defendant and the privileges of a witness were separate and distinct; but since its passage, a defendant who elects to testify occupies the position of both defendant and witness, and thus he combines in his person the rights and privileges of both. But while this is true, we do not think it should result in any change in the law or rules of practice. In his capacity as a witness, he is entitled to the same rights, and is subject to the same rules, as any other witness. In his character of defendant, he has the same rights, and is entitled to the same protection, as were possessed and enjoyed by defendants in a criminal cause before the passage of the act in question. When we are considering the rights of the appellant in his character of defendant, we lose sight of the fact that he has the right to testify as a witness; and when his privileges as a witness are called in question, they should

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be decided without reference to the fact that he is a defendant also.

It necessarily results, from what has been said, that the State had no right to assail the general character of the appellant, as one accused of crime, for the reason he had not put his character in issue.

It is conceded by counsel for appellant, that the State had the right to impeach the appellant, as a witness, by proving that his general character for truth and veracity was bad in the neighborhood of his residence; but it is very strenuously contended, that the State had no right to prove what his general moral character was, to impeach him as a witness.

The solution of this question depends upon whether the last clause of section 242 of the civil code (2 G. & H. 171) applies to the trial of a criminal cause. That clause reads: "In all questions affecting the credibility of a witness, his general moral character may be given in evidence."

It was held by this court, in *Miller v. The State*, 8 Ind. 325, *Quinn v. The State*, 14 Ind. 589, *Harman v. The State*, 22 Ind. 331, *McLaughlin v. The State*, 8 Ind. 281, *Hooper v. The State*, 9 Ind. 572, and *Miller v. The State*, 42 Ind. 544, that the provisions of the civil code do not necessarily govern in criminal practice, yet that it is reasonable to consult them, in the absence of special provisions in the criminal code, in establishing rules. In the present case, we are required to decide the question squarely, whether a witness in a criminal cause may be impeached by proof of his general moral character; because, upon the trial below, the appellant demanded of the court to restrict and limit such testimony to his general character for truth and veracity; but the court overruled the objection, and permitted an inquiry to be instituted into his general moral character.

The statute in question is an innovation upon the common law, and should be strictly construed. It is settled, by a very decided preponderance of authority, that when the purpose was to impeach a witness, the inquiry was confined to general reputation for truth and veracity; and when the purpose was

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to inquire into the character of the defendant, the inquiry was generally limited to that trait of character which had some relevancy to the question in issue. Thus, it was said by the court, in *Boon v. Weathered*, 23 Texas, 682, that "when a man's honesty is in question, his veracity is not in question. When his veracity is in question, one cares not to know whether he be of a peaceable, or of a quarrelsome disposition. If the question is concerning honesty, the inquiry should be concerning honesty. If the question be one of veracity, the inquiry should be directed to the point at issue."

In the case of *The United States v. Van Sickle*, 2 McLean Cir. Ct. 219, the rule is stated with great force. It is there said: "The object of the examination is to shake and overthrow the credit of the witness. Now, this is effectually done by showing that in the neighborhood in which he lives, and where his character is best known, he is not considered worthy of credit. Shall a public opinion which does not reach his credibility, be proven as a fact from which the jury may infer a want of credibility? This would be an inference from public opinion which had not been drawn by the public. It would be a conclusion inferred, not from original facts, but from an opinion formed on those facts by the public. It would be an inference on an inference. This would be a new rule, not yet incorporated, it is believed, into the law of evidence."

In *Atwood v. Impson*, 5 C. E. Green, 150, it is said: "With many, telling the truth is a habit and a principle which they adhere to always, though they may indulge in drinking, swearing, gambling, roystering, and making close bargains. With others, lying is the habit, or principle, and if elevated to be senators or legislators, or made church-members or deacons, it does not always reform them."

We cite, as sustaining the proposition, that, at common law, the inquiry into the general character of a witness was limited to truth, the following authorities: *Teese v. Huntingdon*, 23 How. (U. S.) 2; *The United States v. Van Sickle*, 2 McLean, 219; *Gass v. Stinson*, 2 Sumner, 605; *Gilbert v. Sheldon*, 13 Barb. 623; *The People v. Rector*, 19 Wend. 569; *Jackson v.*

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Lewis, 13 Johns. 504; *The State v. Bruce*, 24 Me. 71; *Commonwealth v. Moore*, 3 Pick. 194; *Morse v. Pineo*, 4 Vt. 281; *State v. Smith*, 7 Vt. 141; *Spears v. Forrest*, 15 Vt. 435; *The State v. Randolph*, 24 Conn. 363; *State v. Howard*, 9 N. H. 485; *Gilchrist v. M'Kee*, 4 Watts, 380; *Chess v. Chess*, 1 Penn. 32; *Uhl v. Commonwealth*, 6 Grat. 706; *Ward v. The State*, 28 Ala. 53; *Ford v. Ford*, 7 Humph. 92; *Jones v. The State*, 13 Texas, 168; *Craig v. The State*, 5 Ohio St. 605; *Wike v. Lightner*, 11 S. & R. 198; *Bucklin v. The State*, 20 Ohio, 18; *Thurman v. Virgin*, 18 B. Mon. 785; *Perkins v. Mobley*, 4 Ohio St. 668; *Bates v. Barber*, 4 Cush. 107; *Ayres v. Duprey*, 27 Texas, 593; *Noel v. Dickey*, 3 Bibb, 268; *Webber v. Hanke*, 4 Mich. 198; *Patriotic Bank v. Coote*, 3 Cranch C. C. 169; *United States v. Masters*, 4 Cranch C. C. 479; *United States v. White*, 5 Cranch C. C. 38; *The United States v. Dickinson*, 2 McLean, 325; *Atwood v. Impson*, 5 C. E. Green, 150; *Newman v. Mackin*, 13 Sm. & M. 383; *Quinn v. The State*, 14 Ind. 589; Whart. Crim. Law, sec. 814; Taylor Ev., sec. 1083.

We are of opinion that the rule of practice established by the legislature in civil cases should not be applied to criminal causes.

The effect of an adverse ruling would be to put a defendant's general moral character in issue, without his consent, which would necessarily and unavoidably prejudice him in his defence of the charge for which he is being tried.

The evidence under examination was improper, as affecting the character of the accused, because he had not put his character in issue; and it was improper for the purpose of impeaching the appellant as a witness, for the reason that in a criminal cause a witness cannot be impeached or sustained by proof of general moral character.

The appellant introduced evidence of the general reputation for truth and veracity of George W. Williams, for the purpose of impeaching him as a witness, and the State, to sustain him, introduced evidence of his general moral charac-

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ter. This, according to the rule above laid down, was improper.

Objection is made to argument of counsel on behalf of the State. Such attorney, while "addressing the jury, commented on the general character of the defendant, and said that said defendant had the power to produce evidence to prove and sustain his general reputation and moral character before the jury, and argued that his failure to do so might be considered against him."

While the appellant had the right to introduce such evidence, he was not bound to do so, and his failure to do so could not be commented on in argument. The legal presumption in his favor could not be impaired or destroyed by his failure to offer affirmative evidence as to character. *State v. Upham*, 38 Me. 261; *Walker v. The State*, 6 Blackf. 1.

The ruling of the learned and usually very accurate judge who presided at the trial was doubtless based upon the supposition that the appellant's general character was in issue; and it is quite likely that the argument of counsel proceeded upon the same theory.

We have postponed to this point the examination of a preliminary question discussed by counsel for appellee. This case was prepared for the decision of this court, under section 121 of the criminal code, 2 G. & H. 420, which provides, that "the bill of exceptions must contain so much of the evidence only as is necessary to present the question of law upon which the exceptions were taken." The evidence is not set out in full, but only so much is stated as was supposed to be necessary to present the questions of law. *Harman v. The State*, 22 Ind. 331. Exception is taken to the form of the bill of exceptions.

The bill of exceptions sets out the evidence offered, the objection of appellant, with reasons therefor, the ruling of the court thereon, and then says: "To which ruling of the court the defendant then and there excepted, and time was given until now in which to file his bill of exceptions." It is

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insisted, that when time is given in which to prepare and file a bill of exceptions, the record must show affirmatively that it was filed within the time limited, and that the word "now," as used in such bill, is not sufficient for that purpose. Such is the rule when time is extended beyond the term. In criminal cases, time cannot be extended beyond the term. It must be signed during the term. The exception must be taken at the time of the ruling, and the bill of exceptions must be made out and presented to the judge at the time of the trial, or within such time as the court may allow during the term. *Stewart v. The State*, 24 Ind. 142. In the present case, the bill was signed and filed during the term, and it shows that the exception was taken at the time of the ruling, and that time was given until *now*, which, according to Webster, means "at the present time." We think the bill of exceptions is properly in the record. *Stewart v. The State*, *supra*; *Dunn v. The State*, 29 Ind. 259; *Fitzenrider v. The State*, 30 Ind. 238; *Port v. Russell*, 36 Ind. 60; *Jenks v. The State*, 39 Ind. 1.

The instructions complained of are properly in the record, independently of the bill of exceptions. They were signed by the judge, and the exception of appellant is entered and signed by counsel. This is sufficient. *The J., M. & I. R. R. Co. v. Cox*, 37 Ind. 325; *Emmons v. Newman*, 38 Ind. 372.

We have been greatly aided, and our labors lightened, by the very full, able, and elaborate briefs of counsel.

The judgment is reversed, with costs; and the cause is remanded for another trial, in accordance with this opinion; and the clerk is directed to issue the necessary order for the return of the prisoner to the jail of the county of Wayne.

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THE GROVER AND BAKER SEWING MACHINE CO. v. BARNES.

PRACTICE.—Demurrer.—Supreme Court.—The Supreme Court will not reverse a judgment for sustaining a demurrer to a good paragraph of a complaint when all the evidence admissible thereunder might have been introduced under a remaining paragraph of the complaint.

SAME.—Exception.—Where the record does not show an exception to the overruling of a demurrer, no question on such ruling can be presented to the Supreme Court.

SAME.—Striking out Pleading.—Bill of Exceptions.—A pleading struck out by order of the court cannot be made a part of the record, except by a bill of exceptions.

SAME.—Special Finding Without Request.—A special finding of facts by the court with conclusions of law upon them, made without request of one of the parties, must be regarded merely as a general finding.

From the Vigo Common Pleas.

W. W. Rumsey, S. Claypool, J. L. Mitchell, and W. A. Ketcham, for appellant.

S. C. Davis, S. B. Davis, L. Barbour, C. P. Jacobs, and — Williams, for appellee.

PETTIT, J.—The appellant brought an action of replevin against the appellee for two promissory notes. The complaint was in three paragraphs, and a demurrer for want of sufficient facts was sustained to the first, and this ruling is the first error assigned. If this paragraph was good, the sustaining of a demurrer to it did not harm or injure the appellant, and the error is not available here, for the reason that all the evidence that could have been given under it might properly have been given under the second and third paragraphs of the complaint.

The overruling of a demurrer to the second paragraph of the answer is assigned for error, but the record does not show that any exception was taken to that ruling; therefore, if the ruling was wrong, the error is not available in this court.

The striking out of the second paragraph of the reply is assigned for error. There is no bill of exceptions in the record showing what this paragraph was. After a pleading has been stricken out by order of the court, it is no longer a part of the record, unless made so by a bill of exceptions.

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The fourth and last assignment of error is in these words: "Error of the court below in this, to wit, the conclusions of law deduced from the special findings of the court." The court found the facts specially, and the conclusion of law, and the last finding is in these words: "Upon these facts the court concludes that said notes were taken contrary to law, and therefore finds for the defendant." Neither party asked the court to find specially the facts, and under the former rulings of this court we can treat this finding only as a general finding for the defendant; and the evidence not being in the record, we cannot say that the finding was erroneous.

The judgment is affirmed, at the costs of the appellant.

ON PETITION FOR A REHEARING.

BUSKIRK, C. J.—The judgment in this case was affirmed, for the reason that it did not appear from the record that the special finding of the court was rendered at the request of one of the parties. A rehearing is asked upon two grounds: First, that the special finding shows that it was rendered at the request of the plaintiff. Second, that the statute does not require that the record should show any request of the parties, or either of them. The special finding is copied into the transcript twice. The first time it has the words, "by request of plaintiff." The second time these words are omitted. After the petition for a rehearing was filed, the court, of its own motion, awarded a *certiorari*, requiring the clerk of the court below to certify a full and complete copy of the special finding, and the clerk in obedience to such writ certified the special finding, and from that it does not appear that it was rendered at the request of either of the parties. It therefore becomes necessary to determine whether a special finding which is rendered by the court, of its own motion and without being requested so to do by either of the parties, is valid as a special finding.

Counsel for appellant very earnestly insist that a special finding is valid, although not rendered at the request of the

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parties, and state that such had been the uniform rule established by this court until the case of *Nash v. Caywood*, 39 Ind. 457, when a new rule, unauthorized by the statute, was laid down.

In this counsel are very much mistaken. The language of sec. 341 is: "Upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall first state the facts in writing, and then the conclusions of the law upon them, and judgment shall be entered accordingly." 2 G. & H. 207. *Addleman v. Erwin*, 6 Ind. 494; *Spencer v. Russell*, 9 Ind. 157; *The Indianapolis Ins. Co. v. Mason*, 11 Ind. 171; *Lewis v. The Central Ins. Co.*, 23 Ind. 445; *Smith v. Jeffries*, 25 Ind. 376; *The City of Logansport v. Wright*, 25 Ind. 512; *Fitzgerald v. Genter*, 26 Ind. 238; *Rathburn v. Wheeler*, 29 Ind. 601; *Luirance v. Luirance*, 32 Ind. 198; *Roberts v. Smith*, 34 Ind. 550; *Milligan v. Poole*, 35 Ind. 64; *Cruzan v. Smith*, 41 Ind. 288; *Curry v. Miller*, 42 Ind. 320.

The language of the statute is, "unless one of the parties request." This language is so plain and direct as to leave but little to construction. The rule as laid down in *Nash v. Caywood*, *supra*, has been practically recognized as the settled rule from the time the code went into effect. In all of the foregoing cases the record shows that the special finding was rendered at the request of one of the parties, and the court uniformly quoted the language of the section as though it was conclusive on the point.

In *Cruzan v. Smith*, *supra*, this court say:

"To present a question for review in this court, under the above section of the statute, four things must concur; first, one of the parties must request the court to find the facts specially, with the view of excepting to the decision of the court upon the questions of law involved in the trial; second, the court must state the facts in writing; third, the conclusions

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of the court upon the questions of law arising upon the facts found must be stated, and judgment must be entered accordingly; fourth, there must be an exception to the decision of the court."

It is thus made apparent that the court, as at present constituted, has established no new rule of practice, and that the original judgment in this case was in accordance with the long and well settled rules of practice in this court.

The petition is overruled.

GREEN ET AL. v. LOUTHAIN.

PLEADING.—Promissory Note.—A complaint on a promissory note need not aver that the note is due, if the note is filed as a part of the complaint, and shows upon its face that it is due.

SAME.—A complaint on a promissory note is fatally defective, if it fails to aver that the note sued on is unpaid.

NEGOTIABLE NOTE.—Protest.—It is not necessary to protest for non-payment a negotiable note payable at a bank in this State. Notice of a demand and of non-payment is all that is required to hold the indorser.

SAME.—Defences to.—A promissory note negotiable by the law merchant, if assigned after maturity, is subject in the hands of the assignee to all defences that could be made to an ordinary non-negotiable note.

From the Delaware Circuit Court.

W. March and *W. Brotherton*, for appellants.

BUSKIRK, C. J.—It is alleged in the complaint, that Isaac E. Runyan and J. L. Blount, on the 23d day of March, 1870, made their promissory note, payable to John F. Sanders, at the National Bank at Muncie, Indiana, on the 1st day of October, 1870, for the sum of two hundred and ten dollars; that on the same day George W. Green indorsed his name on the back thereof, when it was delivered to the payee; that the said John F. Sanders sold and delivered said note to A. C. Mel-

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131	539
49	139
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156	10
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159	534

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lett, for value and before maturity ; that the makers thereof refused to pay the same ; that " the owner of said note had it duly protested for non-payment, and notice thereof put in the post-office, properly addressed to each of the indorsers thereon ;" that afterward A. C. Mellett assigned by delivering the same for value to the plaintiff.

Mellett, who was made a defendant to answer as to his interest in said note, appeared and disclaimed all interest in the note and the controversy.

The other defendants demurred separately to the complaint, but the demurrers were overruled, and this presents for our decision the first question in the case.

The first objection urged to the complaint is, that it does not aver that the note was due. The note was filed with and constituted a part of the complaint, and from that it appears that it was executed on the 23d day of March, 1870, and was due on the 1st day of October of the same year. It appears from the record, that this action was commenced on the 22d day of March, 1871. It sufficiently appears that the note was due when the action was commenced.

It is next objected, that the complaint does not allege that the note was unpaid. This is a fatal objection. *Lawson v. Sherra*, 21 Ind. 363 ; *Pace v. Grove*, 26 Ind. 26 ; *Michael v. Thomas*, 27 Ind. 501 ; *Howorth v. Scarce*, 29 Ind. 278 ; *Kent v. Cantrall*, 44 Ind. 452.

The third objection to the complaint is, that it does not allege that the note was indorsed or assigned to the plaintiff. This objection would be fatal if true. *Holman v. Langtree*, 40 Ind. 349. But the complaint alleges that A. C. Mellett assigned the note by delivery to plaintiff, and Mellett was made a party to answer as to his interest in the note.

The last objection urged to the complaint is, that it does not appear therefrom that the note was protested, and due notice thereof given to the indorsers. No protest of the note was necessary. All that was required to fix the liability of those secondarily liable was a demand of payment and notice of non-payment. *Parkinson v. Finch*, 45 Ind. 122. The

complaint alleges that the note was duly protested, and that notice of its dishonor was given to the indorsers. A protest includes a demand of payment, and notice of non-payment. Protesting would not vitiate the demand. Whether the proper notice of the dishonor of the note was given, was a question of proof upon the trial; and we will not, in advance, undertake to state the law as applicable to demand and notice.

We think the averments of the complaint in reference to the demand of payment and notice of non-payment were sufficient but that the court erred in overruling the demurrer thereto, for the reasons above stated.

Blount and Green filed an answer in five paragraphs:

1. A special *non est factum*.
2. No consideration for note, except the sum of one hundred and twenty-seven dollars.
3. That sixty-five dollars and ninety-seven cents of said note was for usurious interest.
4. That as to sixty-five dollars and ninety-seven cents of said note there was no consideration.
5. That the note was executed and indorsed without any consideration.

A demurrer was filed to the first, second, third, and fourth paragraphs. It was overruled as to the first, and sustained as to the second, third, fourth, and fifth. As there was no demurrer to the fifth, it was error for the court to sustain one to it.

The note was governed by the law merchant, but it having been assigned to the plaintiff after maturity, demand, and non-payment, it is claimed by counsel for appellants that in the hands of the plaintiff it is subject to the same defences as though it had never been governed by commercial law.

It is well settled, that the plaintiff, having acquired title to the note after its maturity and dishonor, holds the same subject to all defences which could be made to an ordinary promissory note. The court erred in sustaining the demurrer to the second, third, and fourth paragraphs of answer. *Hereth v. The Merchants' Nat'l Bank*, 34 Ind. 380.

The judgment is reversed, with costs; and the cause is

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remanded, with directions to the court below to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

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JEFFRIES ET AL. v. MCNAMARA.

PRACTICE.—*Bill of Exceptions.*—A paper purporting to be a bill of exceptions, which shows that it was signed by the judge after the term, but does not show when it was filed, or whether it was ever filed, is no part of the record.

CRIMINAL LAW.—*Obstructing Highway.—Affidavit.*—An affidavit, warrant for arrest, and mittimus, charging that the defendant did unlawfully and knowingly obstruct a certain public highway “by then and there manufacturing a rail fence across said road,” sufficiently describes the offence of obstructing a public highway.

JUDGMENT.—*Justice of the Peace.*—An entry on the docket of a justice of the peace, showing that the defendant was tried, “and, after hearing the evidence, was fined in the sum of twenty-five dollars and costs of suit,” does not show a judgment, or authorize the commitment of the defendant.

FALSE IMPRISONMENT.—*Officer Justified if Process be Good on its Face.*—A warrant of arrest and mittimus issued by a justice of the peace having jurisdiction of the offence charged, each being good on its face, will justify a constable in making the arrest and commitment.

INSTRUCTION.—Giving an instruction, by its terms applicable to several defendants, but bad as to any one of them, is error.

From the Shelby Circuit Court.

B. F. Davis, R. A. Black, and B. F. Love, for appellants.

S. Major and J. B. McFadden, for appellee.

BIDDLE, J.—The appellee sued the appellants for false imprisonment and assault and battery. The appellants joined in an answer of general denial. Jeffries answered in two paragraphs, justifying under certain proceedings had before himself as a justice of the peace. Duval answered in justification, as constable, under the same proceedings. House also, by special answer, justified under the same proceedings. Separate

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demurrers were filed, for want of sufficient facts, to the special paragraphs of the answer by each of the appellants. The demurrers were sustained. Exceptions taken. Trial by jury on the issue of general denial; verdict for appellee; motion for new trial; causes filed; motion overruled; exception; judgment on the verdict; appeal.

There is a paper in the record, purporting to be a bill of exceptions, setting out the evidence, which shows us that it was signed by the judge after the expiration of the term, but at what time it was filed, or whether ever filed, we have no information. It is therefore no part of the record.

The only questions presented for our decision are the rulings on the demurrers and the refusal to give a certain instruction.

The special answer of Jeffries is founded on certain proceedings had before himself as a justice of the peace, which show us that House, on the 7th day of October, 1865, made his affidavit before Jeffries, stating "that on or about the 4th day of October, 1865, in the county of Shelby, and State of Indiana, Bartholomew McNamara did then and there unlawfully and knowingly obstruct the public highway situated in Moral township, Shelby county, and State of Indiana, and described as follows, to wit:" (describing the road), "by then and there manufacturing a rail fence across said road, against the statute," etc.

Upon this affidavit, a warrant was issued, commanding the constable to arrest the appellee, "to answer the charge of having, on or about the 4th day of October, 1865, in said county, unlawfully obstructed the public highway, and described as follows:" Here the road is described. The warrant then concludes: "As Morton House has complained on oath, and have you then and there this writ." Dated this 7th day of October, 1865.

"JOHN H. JEFFRIES, J. P. [Seal.]"

Upon this warrant, the constable made the following return:

"October 9th, 1865. I have this day arrested the within

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named prisoner, Bartholomew McNamara, and have him now before the court. R. M. J. DUVAL, Const."

The appellee filed his affidavit for a change of venue. The justice then tried the cause, and rendered his judgment as follows:

"And the said Bartholomew McNamara failing to pay the costs for a change of venue, or giving security therefor, was then and there tried for the within named offence, and, after hearing the evidence, was fined in the sum of twenty-five dollars and costs of suit, as adjudged by me, this 9th day of October, 1865. JOHN H. JEFFRIES, J. P. [Seal.]"

Upon refusal to pay or replevy the fine and costs by the appellee, the justice issued a mittimus in the following words:

"County of Shelby, ss: The State of Indiana to the jailor of Shelby county. Whereas Bartholomew McNamara has been arrested and tried before me, and adjudged guilty of manufacturing a common rail fence across the public highway, in Moral township, said county and State, and having failed to find bail in the sum of five hundred dollars, the amount at which the bail is fixed, as required by me, for his appearance at the next term of common pleas court to answer such charge, you are therefore commanded to confine him in the county jail until discharged.

"Dated this 9th day of October, 1865.

"JOHN H. JEFFRIES, J. P. [Seal.]"

All of which is authenticated by the certificate of the justice.

As the language of the statute, on which the charge is founded, is as follows: "every person who shall in any manner obstruct any public highway," etc., we are inclined to hold that the words, "by then and there manufacturing a rail fence across said highway," sufficiently describe the manner in which it was obstructed. We therefore think that the affidavit, warrant, and mittimus sufficiently define the offence charged. The mittimus, however, is issued without a proper basis. There is no judgment to support it, nor is it adapted to the case. Instead of committing the appellee for non-payment of

the fine, it commits to answer at the next term of the common pleas court.

To authorize the issuing of the mittimus, there should have been a judgment of committal. 2 G. & H. 639, sec. 18. Therefore, for the want of a proper judgment in the proceedings to authorize the issuing of the mittimus, the special answer of Jeffries is insufficient; and the court, for that reason, properly sustained the demurrer to that paragraph.

The special answer of Duval, the constable, is founded on the same proceedings. He avers that he made the arrest by the authority of the warrant set forth, and delivered the appellee to the jailor by the authority of the mittimus, using no unnecessary violence; and he avers that the arrest and committal were the same acts complained of by the appellee, denying all other facts in the complaint. We think these allegations constitute a good defence for Duval. The justice having jurisdiction of the offence, and the warrant and the mittimus being each good on its face, the constable was justified in making the arrest and committal. He cannot be held responsible for the error in issuing the mittimus. The court therefore erred in sustaining the demurrer to the special paragraph of Duval's answer.

The special paragraph of the answer of House is similar to that of Duval, and for the same reasons must be held good. The demurrer to it, therefore, was erroneously sustained.

For the authorities and general principles sustaining these views, see the following decisions: *M'Neely v. Driskill*, 2 Blackf. 259; *Taylor v. Moffatt*, 2 Blackf. 305; *Hiday v. Gilmore*, 3 Blackf. 48; *Poult v. Slocum*, 3 Blackf. 421; *Lair v. Abrams*, 5 Blackf. 191; *Steel v. Williams*, 18 Ind. 161; *Stancliff v. Palmeto*, 18 Ind. 321; *Colter v. Lower*, 35 Ind. 285; *Boaz v. Tate*, 43 Ind. 60.

The instruction, the refusal of which was excepted to by the appellants, was to the effect that if Jeffries, the justice, and Duval, the constable, acted under the proceedings, as set forth in

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the special paragraphs of their answers, without malice, then the jury "should find for the defendants."

As the instruction applied to all the defendants and was erroneous as to Jeffries, it was properly refused.

The judgment is reversed as to Duval and House, and affirmed as to Jeffries. The cause is remanded for further proceedings as to Duval and House, with instructions to overrule the demurrers to the special paragraphs of their answers.

MAHONEY ET UX. v. ROBBINS.

FRAUD.—Pleading.—Presumption.—An answer alleging that certain notes and a mortgage sued on were obtained by false and fraudulent representations in reference to the title of real estate for which they were given, but containing no averment of failure of title, is bad. In the absence of any averment to the contrary, the title will be presumed to be good.

PLEADING.—Title.—Promissory Note.—In a suit upon a promissory note given for the purchase-money of land, an answer setting up a failure of title, without showing breach of covenant or fraud, is bad on demurrer.

SAME.—Filing Copy.—In pleading failure of title in an action on a promissory note given for real estate, where no fraud is pleaded, a copy of the deed must be filed with the answer.

SAME.—Possession.—Where a deed of conveyance of real estate has been made and accepted, and possession taken under it, want of title will not enable the purchaser to resist payment of the purchase-money, or to recover more than nominal damages on his covenants, while he retains the deed and possession, and has been subjected to no expense or inconvenience on account of defect of title.

DAMAGES.—Nominal.—A judgment will not be reversed for failure to assess nominal damages.

PRACTICE.—Form of Decree.—Waiver.—An objection to the form of a decree cannot be made for the first time in the Supreme Court.

From the Hendricks Circuit Court.

C. C. Nave, for appellants.

J. V. Hadley and *J. S. Ogden*, for appellee.

BUSKIRK, C. J.—This was an action by the appellee, to

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obtain a foreclosure of a mortgage against the appellants and the recovery of a personal judgment against Mahoney upon two notes, which were given for the purchase-money of the real estate described in the mortgage.

Issue, trial by the court, finding for appellee, and, over motion for a new trial, judgment on the finding.

The appellants have assigned for error the sustaining of a demurrer to the first and fourth paragraphs of the answer, and the overruling of the motion for a new trial.

The first paragraph of the answer was unquestionably bad. It alleged that the notes and mortgage were obtained by false and fraudulent representations in reference to the title of the land for which the notes and mortgage in suit were given, but there was no averment that the title was defective and had failed. It alleged that the appellee, and certain other persons in collusion with him, falsely and fraudulently represented that one John W. Hunt had a good and valid title to the land in question; that, in reliance upon such representations, he purchased such land; that Hunt and wife had conveyed the property, and the notes and mortgage had been executed to secure the balance due of the purchase-money. In the absence of any averment showing a failure of title, we will presume that the title was good. There was no error in sustaining a demurrer to this paragraph of the answer.

The fourth paragraph alleges that John W. Hunt and wife conveyed to appellant Mahoney the land in question; that thereupon the appellants executed the notes and mortgage in suit to secure the unpaid purchase-money, six hundred dollars having been paid in hand; that the said John W. Hunt did not, at the time of making said contract and the execution of said deed, and the making of said notes and mortgage aforesaid, have a good and sufficient title in fee simple in and to the above described tract of land, nor has he acquired title thereto since the execution of said deed, mortgage, and notes aforesaid, but the title to said tract of land was and is in one Johnson Hunt, and not in said John W. Hunt; wherefore, etc.

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The matters set up in such paragraph constituted no defence to the action. It was held in *Laughery v. McLean*, 14 Ind. 106, from which case the above answer seems to have been copied, that in a suit upon a promissory note given for the purchase-money of land, an answer setting up a failure of title, without showing breach of covenant or fraud, is bad on demurrer. The ruling in that case has been adhered to in the following cases: *Swain v. Morberly*, 17 Ind. 99; *Johnson v. Houghton*, 19 Ind. 359; *The Terre Haute, etc., R. R. Co. v. Norman*, 22 Ind. 63; *McClintic's Adm'r v. Cory*, 22 Ind. 170; *Coleman v. Hart*, 25 Ind. 256; *Starkey v. Neese*, 30 Ind. 222; *James v. Hays*, 34 Ind. 272; *Church v. Fisher*, 40 Ind. 145; *Galbreath v. McNeily*, 40 Ind. 231.

The deed is not set out in or made a part of the answer, nor any of the covenants. Nor is there any allegation of fraud. This omission rendered the answer bad. *Woodford v. Leavenworth*, 14 Ind. 311; *Jenkinson v. Ewing*, 17 Ind. 505; *McClerkin v. Sutton*, 29 Ind. 407; *Starkey v. Neese, supra*; *Church v. Fisher, supra*.

It is well settled that where a deed is made and accepted, and possession taken under it, want of title will not enable the purchaser to resist the payment of the purchase-money, or recover more than nominal damages on his covenants, while he retains the deed and possession, and has been subjected to no inconvenience or expense on account of defect of title; and for such damages a judgment will not be reversed. *Tate v. Booe*, 9 Ind. 13; *Small v. Reeves*, 14 Ind. 163; *Hacker v. Blake*, 17 Ind. 97; *Estep v. Estep*, 23 Ind. 114.

The court was clearly right in sustaining the demurrer to such answer.

It is also claimed that the court should have granted a new trial on account of excessive damages. There was a controversy on the trial about a credit of fifty dollars. Two witnesses swore one way and two the other. The court below believed the witnesses for appellee. In that we think the court below was right. There was no error in overruling such motion.

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Counsel in his brief objects to the form of the decree. There was no objection made to it below, and the question cannot be raised here for the first time.

The judgment is affirmed, with costs and five per cent. damages.

CAVANAUGH, ADM'R, v. THE TOLEDO, WABASH, AND WEST-
ERN RAILWAY COMPANY.

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JUDGMENT.—Relief from.—By section 99 of the code of practice, as amended by the act of March 4th, 1867, it is made the imperative duty of the court, where application is made within the statutory period, to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect.

SAME.—An action was dismissed on call, because of the absence of the plaintiff and his attorney. It was afterward shown that the attorney had been misinformed as to the time the cause was set for trial, and was therefore absent, and that the failure of the plaintiff and his witnesses to be present was caused by a delay of several hours of a railroad train, on which he depended for conveyance to the place where the court was sitting.

Held, that this was a case of excusable neglect, and that the plaintiff was entitled to have the judgment of dismissal set aside.

SAME.—Imposing Conditions.—In granting relief under this statute, the court may impose conditions, but they must be reasonable. To require, as a condition of relief, that the plaintiff shall pay all the costs in the case, including the costs taxable against the defendant for failing to perfect a change of venue, and the costs of a continuance asked by the defendant, for which judgment had been previously rendered in the plaintiff's favor, and also the costs of various continuances had by agreement of the parties, was unreasonable.

SAME.—It would have been reasonable to require the plaintiff to pay the costs occasioned by his excusable neglect, and to render judgment therefor, but it was not competent for the court to make the actual payment of such costs a condition of granting relief. (DOWNEY, J., dissented.)

SAME.—Administrator.—Costs.—By section 784 of the code, an administrator is not personally liable for costs in an action prosecuted by him in his fiduciary capacity.

From the Warren Circuit Court.

Cavanaugh, Adm'r, v. The Toledo, etc., R. W. Co.

J. McCabe, for appellant.

W. Z. Stuart, for appellee.

BUSKIRK, C. J.—The appellant, as administrator of the estate of Edward Riley, deceased, sued the appellee to recover damages for the wrongful and negligent acts of appellee, which caused the death of appellant's intestate.

The appellee answered by the general denial and an affirmative paragraph, in which it was averred, that the death of the decedent was caused by his own wrongful and negligent conduct. The cause was continued several times by agreement. At the April term, 1873, the appellant required the appellee to continue at her costs. At the September term, 1873, the appellee had the appellant called, and she failing to appear, the cause was dismissed, reserving to the appellant the right to move, during the term, to reinstate the cause.

Upon the ninth day the appellant appeared, and filed a written motion to set aside the default and reinstate the cause, and in support thereof filed his own affidavit and that of George McWilliams, his principal attorney. From his own affidavit it is made to appear, that he resided at State Line, sixteen miles west of the county seat of Warren county; that he and four of his witnesses were at the depot the morning the case was set for trial, ready to take the train that usually passed there at forty minutes past eight o'clock A. M., and which would have taken them to court in proper time to have proceeded with the trial of said cause; but that such train was, for some cause, several hours behind time, and that in consequence he did not arrive at court until noon of said day, when he learned that the case had been dismissed. The affidavit, in other respects, was sufficient.

The affidavit of McWilliams showed that his absence was caused by a misunderstanding as to the day the cause was set for trial.

The court made an order that the default should be set aside, on the condition that the appellant paid, within thirty days, all the costs made in said cause since the October adjourned term of 1871.

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At the next term of the court, the appellee moved to dismiss the cause for the failure of the appellant to pay the costs within thirty days. In answer to such motion, the appellant showed, by affidavit, that he was not personally present in court when the default was set aside, and that he did not know that the order of the court required the payment of the costs within thirty days, and that as such administrator he had no means with which to pay said costs, and that he would have no assets unless he recovered a judgment against the appellee.

The court sustained the motion, and dismissed the cause, for the failure of the appellant to pay the costs within thirty days; and this ruling is assigned for error, and presents the only question there is for our decision.

The ruling of the court below cannot be sustained on principle or by authority. At the April term, 1871, the issues in the cause were closed, when, upon the application of the appellee, the venue was ordered to be changed to Tippecanoe county, on the condition that the costs of such change were paid within sixty days therefrom. The appellee failed to pay the costs and perfect the appeal.

At the next term, the appellant moved to tax against the appellee all the costs which had accrued in said cause for failure to perfect such change of venue. The motion was taken under advisement, and it does not appear that it has been decided. At that term the cause was continued by agreement. At the April and October terms of 1872, the cause was continued by agreement. At the April term, 1873, the cause was continued upon the application and at the costs of the appellee, and judgment was rendered for such costs. At the September term, 1873, the cause was dismissed, as hereinbefore stated.

The costs occasioned by the continuance of the cause by agreement should abide the event of the suit.

The court should have taxed against the appellee all the costs which had accrued in the cause up to the time when she failed to perfect her change of venue. Sec. 208, 2 G. & H. 155.

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A judgment having been rendered against the appellee for the costs occasioned by the continuance at the April term, 1873, the court possessed no power to require the appellant to pay such costs as a condition upon which the default was to be set aside.

By section 99 of the code, as amended by the act of March 4th, 1867, 3 Ind. Stat. 373, it is provided, that the court "shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise or excusable neglect." Under the section as amended, the duty of the court was imperative. It had no discretion. It was bound to grant the relief. *Bush v. Bush*, 46 Ind. 70, and authorities there cited.

In granting relief under section 99, the court may impose such conditions as are proper. To make them proper, they must be just and reasonable. It certainly was not proper to require the appellant to pay costs which had been adjudged against the appellee, such as should have been adjudged against her for failure to perfect the change of venue, and such as should abide the event of the suit. The failure of the appellant to be present at the time set for the trial resulted in a continuance of the cause, and it would have been reasonable and proper to have adjudged against the appellant all the costs occasioned by his default. But we do not think it was proper for the court to require the actual payment of the costs within a limited time. Such a condition was unreasonable, and, in many cases, would operate oppressively and produce injustice, where parties were unable to pay such costs.

We think it was fully shown that the default of the appellant was the result of excusable neglect on the part of the appellant and of mistake on the part of his attorney. This ruling is not in conflict with that of *Yater v. Mullen*, 23 Ind. 562, and the same case on petition for a rehearing, in 24 Ind. 277. In that case, the defendant was guilty of inexcusable neglect. He left home and went to Indianapolis to attend to private business, when he should have been at court, and was detained by an accident on the railroad. In this case, the

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appellant was at his home, sixteen miles distant from the sitting of the court, and on the morning in question he was at the depot, with his witnesses, ready to go to court by the usual mode of travel, and was prevented by the default of the employees of the appellee. A judgment by default against appellant, caused by the default of appellee, makes a very different case to the one above cited.

This action was instituted and prosecuted by an administrator, under section 784 of the code, 2 G. & H. 330, for the benefit of the widow and children of the decedent. The cause was dismissed at the costs of the appellant personally. An administrator or executor is not personally liable for costs in an action prosecuted by him in a fiduciary capacity. Sec. 151, 2 G. & H. 527; *Evans v. Newland*, 34 Ind. 112.

Counsel for appellee suggests, that no relief should be granted, because the complaint is bad. The suggestion would have been entitled to greater weight and consideration, if the appellee, instead of answering the complaint, had tested its sufficiency by demurrer.

It is very manifest that the court erred in dismissing the cause.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to set aside the judgment dismissing the cause, and to reinstate the cause, and for further proceedings in accordance with this opinion.

DOWNEY, J.—I do not agree to that part of the foregoing opinion which holds, that the court may not, on setting aside a default, require the party in default to pay, in a limited time, the costs with which he is properly chargeable. I think the court may require the payment of such costs within a time limited, or may require the payment as a condition precedent to setting aside the default.

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THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD Co. v. BOWEN.

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BILL OF EXCEPTIONS.—*Amendment of.*—After a bill of exceptions has been signed and filed, it is competent for the court, on notice and motion, to order its correction by the insertion of omitted evidence.

RAILROAD.—*Injury to Child.*—*Negligence of Parents.*—It is negligence in a parent to permit a child between three and four years of age to be upon a railroad track where trains are frequently passing; and if the child be killed by a train of cars, the parent cannot recover damages therefor, unless such killing be done purposely or wilfully.

SUPREME COURT.—*Rule of Decision.*—Where, after allowing for all presumptions in favor of a verdict and of the rulings of the court below, it clearly appears that the verdict is not supported by the evidence, the judgment will be reversed.

From the Jefferson Circuit Court.

C. F. Walker, W. S. Roberts, C. Baker, O. B. Hord, and A. W. Hendricks, for appellant.

G. H. Voss, J. L. Wilson, and E. R. Wilson, for appellee.

BIDDLE, J.—This case was once before brought to this court, and a decision had at the May term, 1874. 40 Ind. 545.

The complaint of the appellee alleges that the appellant killed his son, aged five years, by wrongfully running a train of cars over his body, along a public street in the city of Madison. A demurrer to the complaint was overruled. We need not notice this ruling any further than to say that the complaint is substantially the same as that which was held good in the former decision above cited. There was, therefore, no error in overruling the demurrer. In this trial there was no issue formed except by the general denial. A trial by jury was had; verdict and judgment for the appellee, with such steps by the appellant as to properly bring the case to this court.

The judgment was rendered on the 13th day of June, 1873. Sixty days were allowed within which to file a bill of exceptions. The bill of exceptions was filed July 31st, 1873, from which it seems the testimony of Daniel Dickey, a witness called by the appellee, and also an ordinance passed by the

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city of Madison, introduced as evidence by the appellee, were omitted. On the 21st day of August, 1873, the appellant served notice on the appellee that she would, at the next term of the court, in September, move to correct the bill of exceptions. The appellee appeared to this motion, contested the matter, and the court, on the 12th day of September, 1873, caused the testimony of Dickey and the ordinance mentioned to be made a part of the bill of exceptions. The transcript of the record was filed in this court October 28th, 1873. On the 26th day of November, 1873, the appellee, in this court, moved to strike from the record the proceedings had to correct the bill of exceptions, as above stated, which motion is overruled. It is clear that the testimony of Dickey and the ordinance were introduced to the jury as evidence, and there is some evidence tending to show that this evidence was omitted, in the general bill of exceptions, on account of the notes of Dickey's evidence being in possession of appellee's attorneys. We think the court very properly corrected the bill of exceptions.

The instructions asked by the appellant, numbered 4 and 7, and refused by the court, correctly express the law governing the case; but we find that the court afterward, in instruction numbered 9, of its own motion, properly instructed the jury in words of similar import to the instructions refused. There is nothing in this point, therefore, of which the appellee has a right to complain.

The sufficiency of the evidence to sustain the verdict is the only remaining question to decide. We have read it carefully, and considered it in every view, and have held it long under advisement. It is not substantially different from that given on the former trial, and need not, therefore, be re-stated in this opinion, as reference may be had to the decision above cited. It may be added that it shows the child to have been but three years and eight months old at the time of its death. We held, and still hold on full consideration, that, where a parent, asking compensation for the injury, allows his child, of such tender years, immature judgment, and bodily helplessness, to go into danger

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unattended, it is contributory negligence on his part, and he cannot recover, unless the killing was purposely or wilfully done. The question is, then, does the evidence establish such a killing? Allowing for all the presumptions in favor of a verdict, and also in favor of the rulings of the court below, we cannot think that it does. To us it seems that there is scarcely even slight negligence proved against the appellant. We very much dislike to reverse a case the second time for the same cause, especially as the point is one of fact and not of law, but our reluctance must yield to the sense of duty.

The judgment is reversed; cause remanded, with instructions to grant a new trial, and for further proceedings.

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MALICIOUS PROSECUTION.—*Probable Cause.*—If the plaintiff in an action for malicious prosecution was in fact innocent of the criminal offence with which he was charged, the defendant cannot defeat the action by showing that there was in fact probable cause, if he did not know of the existence of the facts constituting the probable cause at the time of making the charge.

SAME.—*Variance.*—The complaint alleged that the defendant, without probable cause, charged the plaintiff with having distilled spirits without license from the Government of the United States, and without having given the bond required by the laws of the United States. The affidavit on which the plaintiff had been prosecuted said nothing about the bond. *Held*, that the variance was not material. An offence was charged independently of the allegation of the failure to give bond.

DISTILLER'S LICENSE.—The payment of the tax and the receipt therefor amount, in substance, to a license, and confer on the party a right to carry on the business for the time for which the tax has been paid, on complying with the law in other respects.

MALICIOUS PROSECUTION.—*Advice of Counsel.*—A defendant in an action for malicious prosecution cannot defeat the suit by proof that he acted on the advice of counsel, if there was any material fact not communicated to counsel, of which the defendant had knowledge, or which he could have known by the exercise of reasonable diligence.

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From the Owen Circuit Court.

S. Claypool, J. L. Mitchell, W. A. Ketcham, G. W. Friedley,
and *P. A. Parks*, for appellants.

C. F. McNutt, for appellee.

DOWNEY, J.—Action by the appellee against Galloway, Meadows, Trogden, and Stafford, the appellants, for maliciously prosecuting the plaintiff, before a United States Commissioner, for carrying on the business of distilling without a license.

Issues, trial by jury, verdict for plaintiff, motion for a new trial overruled, and final judgment for the plaintiff. Error assigned, overruling the motion for a new trial.

The first question presented is with reference to the refusal of the following instruction asked by the defendants: "If facts existed which would have justified the charge made, showing probable cause, it makes no difference whether the defendants knew it at the time of making the charge or not."

The court not only refused the above instruction, but gave this: "Acts of guilt, which have been proven, if any, against the plaintiff, which were not known by the defendants at the commencement of the prosecution, are not to be considered in establishing 'probable cause'—they are now introduced for the purpose of proving the plaintiff's guilt."

If the defendant in the action for malicious prosecution proves that the plaintiff in that action was guilty of the crime charged against him, it is immaterial with what degree of malice the prosecution was commenced and carried on; the defence is complete; and this is true, although the plaintiff in the civil action was acquitted in the criminal prosecution. *Adams v. Lisher*, 3 Blackf. 241, 445; *Foshay v. Ferguson*, 2 Denio, 617.

But the question remains, can the defendant in the civil action defend himself, supposing that the plaintiff in the civil action was not guilty of the crime, by showing that there was in fact probable cause, although he did not know of the existence of the facts constituting the probable cause at the time of making the charge? We think he cannot. When the guilt

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of the plaintiff of the crime charged is shown, probabilities are at an end.

The doctrine concerning probable cause must relate more especially to cases where the guilt of the plaintiff of the crime charged is not shown by the evidence, but is only rendered probable from the circumstances disclosed. That the facts constituting probable cause must be known to the party preferring the charge, is expressly stated in some of the cases in this court, and is clearly implied in others.

In *Lacy v. Mitchell*, 23 Ind. 67, it was said: "Probable cause may be defined to be that apparent state of facts found to exist upon reasonable inquiry; that is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged; and, in a civil case, that a cause of action existed."

Knowledge of the facts by the prosecutor is clearly implied in this statement of what constitutes probable cause.

In *Hays v. Blizzard*, 30 Ind. 457, it is said: "But where the facts known to the prosecutor, or the information received by him from sources entitled to credit, are such as to justify the belief, in the mind of a person of reasonable intelligence and caution, that the accused is guilty of the crime charged, and the prosecution is induced thereby, such a state of facts constitutes probable cause, though it may subsequently appear that the accused is innocent."

Here, knowledge, or information entitled to credit, is made an essential part of the definition of probable cause. See, also, *Bacon v. Towne*, 4 Cush. 238, referred to in the opinion in the last cited case, and Addison Torts, 613.

In *Turner v. Ambler*, 10 Queen's Bench, 252, Lord DENMAN, C. J., said: "The prevailing law of reasonable and probable cause is, that the jury are to ascertain certain facts, and the judge is to decide whether those facts amount to such cause. But among the facts to be ascertained is the knowledge of the defendant of the existence of those which tend to show reasonable and probable cause, because without knowing them he

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could not act upon them ; and also the defendant's belief that the facts amount to the offence which he charged, because otherwise he will have made them the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute. In other words, the reasonable and probable cause must appear not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding ; and perhaps whether they did so or not is rather an independent question for the jury, to be decided on their view of all the particulars of the defendant's conduct, than for the judge, to whom the legal effect of the facts only is more properly referred." See, also, *Delegal v. Highley*, 3 Bing. N. C. 950.

The next question is discussed under the head of variance. The complaint alleges, that " the defendants, without probable cause, charged the plaintiff with having distilled spirits without license from the government of the United States, and without giving bond as required by laws of the United States."

The charge contained in the affidavit before the United States Commissioner was, that the plaintiff and others " unlawfully, knowingly, and feloniously, and contrary to the act of Congress in such cases, did * * carry on and exercise the business of a distillery, by then and there making and producing distilled spirits, and by then and there making mash, wort, and wash, fit for distillation and the production of spirits ; and they then and there having in their possession a still, without having first paid a special tax as a distiller, as required by law."

The court instructed the jury that the affidavit before the commissioner substantially sustained the allegations of the complaint as to the crime which had been charged against the plaintiff. The defendants asked the court to instruct otherwise, and the court refused.

We have no doubt that the rule is as claimed by counsel, and as held in *Adams v. Lisher*, 3 Blackf. 241, that " in actions of this sort, the proceedings in the prosecution of the suit should be stated correctly ; and the charge against the plaintiff, and the judicial proceedings thereon, should also be stated as they

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exist, so as to correspond with the facts, and with the record of acquittal."

We think, however, that the instruction of the court was correct. The question was not presented by an objection to the introduction of the evidence. The question is, does the evidence, when introduced, sustain the allegation? We think, in substance, it does. It is true, the charge preferred says nothing as to the part of the allegation in the complaint, that the distilling was without giving bond. The court told the jury, in the charge, that this part of the allegation was not sustained. In substance, the allegation in the complaint, leaving out what was said about the bond, is, that the defendant in the criminal case had been engaged in the business of distilling without authority from the government of the United States. The criminal charge was, that the party accused had carried on the business without having first paid a special tax as a distiller, as required by law. The payment of the tax and the receipt therefor amount, in substance, to a license, and confer upon the party the right to carry on the business for the time for which the tax has been paid, on complying with the law in other respects.

The next question relates to an instruction on the subject of the advice of counsel. The question is thus stated in the brief of counsel for appellants: "On this subject the court below directed the jury wrong. After a general instruction on this subject, to wit, the seventh instruction, which was perhaps correct, the court said to the jury in effect, among other things, that if there was any material fact or facts not communicated to the counsel, of which the defendants had knowledge, or which they could have known by the exercise of reasonable diligence, 'then the advice would not avail the defendants as an excuse for the prosecution.'"

This instruction was in substantial conformity to the rulings of this court on the subject. *Scotten v. Longfellow*, 40 Ind. 23.

The defendant asked the court to instruct the jury, that if, after a full and fair statement of all facts in his knowledge,

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Knefler and Brown advised Meadows that there was probable cause of guilt, or a technical case, and if they induced him to make the affidavit under such circumstances, and he made the affidavit under the direction of the law officers, believing either that he was required, or that it was his duty to do so, then the action could not be maintained against him. These instructions were refused.

Knefler was the commissioner before whom the charge was preferred, and Brown was the United States District Attorney. They were not the counsel of Meadows, who is a defendant in this action.

We do not think the court erred in refusing this charge. It assumes that the defendants are justified, if Meadows communicated "all the facts in his knowledge" to the law officers of the United States, without reference to the fact whether Meadows possessed a knowledge of any facts, or what facts, if any. The position cannot be sustained.

The judgment is affirmed, with three per cent. damages and costs.

THE NEW ALBANY, LOUISVILLE, AND CORYDON PLANK
ROAD CO. v. LEWIS.

TURNPIKE.—Tolls.—Contract.—A complaint to recover tolls for passing over a turnpike alleged a contract between the defendant and one W., the secretary and treasurer of the plaintiff, by which the defendant agreed to pay the tolls monthly.

Held, that the complaint was insufficient. It should have averred a contract with the company, or shown that W. was authorized by the board of directors to make such contract, or that some consideration passed from W. to support the promise made to him.

SAME.—Implied Promise.—An action on an implied promise will lie to recover legal tolls for the use of a turnpike. The company is not restricted to a suit for the penalty provided by statute for passing a toll-gate without paying toll.

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From the Harrison Circuit Court.

L. Jordan and *H. Jordan*, for appellant.

G. V. Howk and *W. W. Tuley*, for appellee.

BUSKIRK, C. J.—The only question presented by the record in this cause is as to the sufficiency of the complaint, to which a demurrer was sustained by the court below. The complaint was in two paragraphs, and, omitting the formal parts, was as follows:

“Paragraph 1. The New Albany, Louisville, and Corydon Plank Road Company, plaintiff, a corporation duly organized under the laws of the State of Indiana, complains of Jacob Lewis, defendant, and says that on the 1st day of July, 1869, the said defendant was running a two-horse stage from the town of Corydon to the city of New Albany, Indiana, and passed over the road of said plaintiff; and the said defendant agreed with Samuel J. Wright, secretary and treasurer of said corporation, that he would pay the toll of all the gates on said road, except the gate No. 5 at the town of Corydon, which said toll he was to pay directly to said secretary and treasurer monthly; plaintiff says the toll which said defendant so agreed to pay the said secretary and treasurer was the sum of twenty-seven cents per day. Plaintiff further says that said defendant did pay said toll for the months of July and August, 1869, and that from that time until the 1st day of September, 1873, the said defendant has wholly failed and refused to pay said toll, although he has passed over the said road with the said two-horse stage every week day during the whole of said time, amounting to the number of twelve hundred and sixty-two days, at twenty-seven cents per day, making the sum of three hundred and forty dollars and seventy cents, all of which remains due and unpaid; wherefore plaintiff demands judgment in the sum of five hundred dollars.

“Paragraph 2. And the said plaintiff, the New Albany, Louisville, and Corydon Plank Road Company, for further cause of action, complains of the said defendant, Jacob Lewis, and says that the plaintiff is a corporation, organized under the laws of the State of Indiana, and the owner of a road

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leading from New Albany, Floyd county, Indiana, to Corydon, Harrison county, Indiana, upon which toll is authorized to be taken. Plaintiff says that since the 1st day of September, 1869, the said defendant has passed over her said road, from the town of Corydon to the town of Lanesville, every week day, with a two-horse vehicle, or three hundred and thirteen times a year, and in the four years, from September 1st, 1869, to September 1st, 1873, twelve hundred and sixty-two times, and that the amount of toll which defendant was liable to pay each time he passed over said road was twenty-seven cents, making three hundred and forty dollars and seventy-four cents, all of which remains due and wholly unpaid; wherefore plaintiff demands judgment for the sum of five hundred dollars.

JONES & WRIGHT,

“Attorneys for Plaintiff.”

The following objections are urged to the first paragraph of the complaint:

1. It does not state any contract, duly or unduly made by the appellant or any one else with the appellee. It does state that the appellee agreed with Samuel J. Wright, appellant's secretary and treasurer, to pay the toll of gate No. 5 directly to such secretary and treasurer monthly, but does not state that appellant was a party to the agreement; nor does this paragraph state that Samuel J. Wright agreed to do anything on his part, in appellant's behalf, as a consideration of appellee's alleged agreement. Nor is it alleged that appellee might pay the tolls of gate No. 5, monthly, directly to the said secretary and treasurer. For these reasons, it is claimed that the agreement set up was a *nudum pactum*, and, therefore, constitutes no cause of action.

2. That the matter of tolls was under the exclusive control of the board of directors, and not of the secretary and treasurer, and consequently the secretary had no power to make the contract, there being no averment that he had such power.

3. That tolls upon the plank road were regulated by law, and were not matter of contract.

4. That the contract set up was illegal and void, because,

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by the law, the toll was regulated by the number of miles travelled, and not by the number of gates.

The second paragraph of the complaint differs from the first, in this, that it does not state or count upon any agreement by or with the appellee. It states, in substance, that the appellant is a corporation, organized under the laws of Indiana, and the owner of a road leading from New Albany to Corydon, Indiana, upon which toll is authorized to be taken; that since September 1st, 1869, the appellee has passed over appellant's said road, from Corydon to Lanesville, every week day, with a vehicle and two horses, or three hundred and thirteen times a year, from September 1st, 1869, to September 1st, 1873, four years, in the aggregate twelve hundred and six-two times, and that the amount of toll which the appellee was liable to pay each time he so passed over said road, was twenty-seven cents, making three hundred and forty dollars and seventy-four cents, all of which remains due and wholly unpaid.

It is insisted by counsel for appellee that if the appellee passed over the road of the appellant with consent of appellant, and without the exaction of any legal toll therefor, or any promise to pay the same then or thereafter, no debt could arise under such circumstances; and that if the appellee passed over said road without the consent of appellant and without payment of toll, then the appellee was liable to a penalty, under the statute.

We think the first and second objections urged to the first paragraph of the complaint are valid, and that the court committed no error in sustaining the demurrer thereto.

And in our opinion, the objections urged to the second paragraph of the complaint are invalid, and the facts stated therein created an implied obligation, on the part of the appellee, to pay for the use of the road of the appellant, and hence, the court erred in sustaining a demurrer to such paragraph.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the second paragraph of the complaint.

Sanford *et al.* v. Wood.

SANFORD ET AL. v. WOOD.

ARBITRATION.—Award.—Umpire.—By a parol agreement to submit a matter in controversy to the arbitration of two persons, it was stipulated that, in case they could not agree, they should select an umpire, and that the decision of such umpire and any of said arbitrators should be final, etc.

Held, that the decision of the umpire was all that was required. If one or both the arbitrators had agreed with him, it would still have been the decision of the umpire.

PLEADING.—Award.—Filing Copy of.—Where a written award is pleaded, although made in a common law arbitration, a copy of the award must be filed with the pleading.

MARRIED WOMAN.—Contract.—Set-Off.—When a married woman receives money on a parol contract for the sale of her lands, but fails to convey, a personal action cannot be sustained against her to recover the money so paid; nor can it be made a matter of set-off in an action on a promissory note brought by such married woman against the party who has paid such money.

From the Elkhart Circuit Court.

W. A. Woods, for appellants.

J. H. Baker and *J. A. S. Mitchell*, for appellee.

BUSKIRK, C. J.—This was an action upon a promissory note executed by the appellants and payable to the appellee.

The answer was in one paragraph, by way of set-off. It averred that the note sued on was made by Robert Sanford, as principal, and by Henry Sanford, as surety; that the plaintiff was indebted to Robert in the sum of two hundred dollars, for money paid by said Robert to plaintiff upon a parol executory contract for the sale of certain real estate by plaintiff, which she owned in her own right, to said Robert; that the plaintiff had annulled the agreement and refused to convey, and had invested the money so paid to her in the purchase of lands in Iowa for her own separate use, and had refused to repay the money so paid to her on said contract.

There was a reply in three paragraphs:

1. That prior to the institution of this suit, the said alleged cause of action mentioned in the answer of defendants, and all

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and singular the rights and liabilities of the plaintiff and defendant Robert Sanford, growing out of and relating to said alleged purchase and sale of real estate in the answer mentioned, were, by the parol agreement of the plaintiff and the defendant Robert Sanford, submitted to the arbitrament and award of Edson Gregory and William B. Gorman ; and it was further agreed that if said Gregory and Gorman failed, or were unable to agree, then and in that case said arbitrators should call in and select a third person to act as umpire, and the decision of said umpire and any of said arbitrators should be final and conclusive on the rights of the parties hereto ; and the plaintiff avers that said Gregory and Gorman took upon themselves the burden of said arbitration, and having heard and considered the matters so as aforesaid submitted to them, found themselves unable to agree and decide said matters ; they called in and selected as an umpire, or referee, one Isaac Bucklen, and thereupon said Bucklen, having been sufficiently advised in the premises, decided and awarded that the plaintiff owed, and in nothing was indebted to said Robert Sanford, growing out of any of the matters and things in said answer contained ; and said Bucklen and Gregory served a copy of their said award in writing on the said Robert Sanford ; wherefore, etc.

And for a second and further reply in this behalf, the said plaintiff avers, that at and before the alleged contract and agreement to sell the lands mentioned in the answer were made, and at and before the payment to her of said two hundred dollars, she, the said plaintiff, was a married woman, and was the wife of Charles Wood, and she has remained the wife of said Wood from thence hitherto.

And for a third and further reply in this behalf, the said plaintiff avers, that long before the happening of the matters and things in the answer mentioned, and for more than twenty years last past, she has been the wife of one Charles Wood, and during all the time aforesaid down to the present time, she has been under coverture ; and she avers that after having received the said sum of two hundred dollars, she bought

lands in Iowa, and paid on said lands said two hundred dollars; and the said Robert Sanford having failed and refused to take said lands so bargained by this plaintiff to him, she, the said plaintiff, was unable to comply with the terms of her bargain for said Iowa lands, and she thereby, through said Sanford, defendant, entirely lost said sum of money so paid; wherefore, etc.

Demurrers were overruled to each paragraph of the reply, and this ruling is assigned for error.

Three objections are urged to the first paragraph of the reply :

1. That it does not appear that the right of the appellee to retain the two hundred dollars after the rescission of the contract was submitted to the arbitrators, but only her rights on the theory that the contract was still in force.

We think the objection is untenable. The reply says, that "all and singular the rights and liabilities of the plaintiff and defendant Robert Sanford, growing out of, or relating to, said alleged purchase and sale of real estate in the answer mentioned, were," etc.

2. That the only award made was by the umpire, when by the agreement the decision of the umpire and one of the arbitrators was required.

The decision of the umpire was all that was required. If one or both of the arbitrators had agreed with him in his decision, it would still have been the decision of the umpire. *Kile v. Chapin*, 9 Ind. 150; *Baker v. Farmbrough*, 43 Ind. 240.

3. The third objection is, that a copy of the award was not filed with and made a part of the reply.

It was held, in *Hays v. Miller*, 12 Ind. 187, that, in a suit upon an award, a copy of such award should be filed with the complaint. It is, however, contended by counsel for appellee, that an award is in the nature of a judgment, and that, under the ruling in *Lytle v. Lytle*, 37 Ind. 281, and *Brooks v. Harris*, 41 Ind. 390, it was not necessary to file a copy. We do not think an award comes within the rule laid down in the above cases.

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It is further insisted by counsel for appellee, that, as this was a common law award, it need not have been in writing. It is true, the award would have been valid without being in writing. *Titus v. Scantling*, 4 Blackf. 89; *Smith v. Stewart*, 5 Ind. 220; *Kile v. Chapin*, *supra*; *Saunders v. Heaton*, 12 Ind. 20; *Carson v. Earlywine*, 14 Ind. 256. But the award having been reduced to writing, it became a written instrument within the meaning of our statute, and we think the award or a copy of it should have been filed with the reply. The first paragraph of the reply was based upon the award.

The second and third paragraphs present the same question, and that is, whether upon the facts of the case there is any liability against the appellee, connected with and growing out of the parol executory contract for the sale of real estate. The money advanced to the appellee upon such contract cannot be a valid set-off, unless it could have been recovered in a direct action by Robert Sanford against the appellee. *Curran v. Curran*, 40 Ind. 473.

A set-off consists of matter arising out of debt, duty, or contract. At the time of making the contract, the appellee was a married woman, and might have conveyed the property by her husband joining with her. The question as to when and under what circumstances a married woman may create a lien upon her separate real property is not before us, and we decide nothing in reference thereto. The question is, whether there is a personal liability against the appellee. If the appellee could have rendered herself liable by an express contract, then there may be an implied obligation. It is well settled, by repeated decisions of this court, that the appellee would not have been liable if she had given her note, and had thereby expressly agreed to pay the money so advanced to her. *Johnson v. Tutewiler*, 35 Ind. 353; *Hasheagen v. Specker*, 36 Ind. 413; *Black v. Rogers*, 36 Ind. 420; *Moreau v. Branson*, 37 Ind. 195; *Cook v. Walton*, 38 Ind. 228; *Capp v. Stewart*, 38 Ind. 479; *Mattox v. Hightshue*, 39 Ind. 95.

In the case last cited, it was held, that one who has pur-

chased real estate from a married woman who had no power to sell or convey has no lien on the land to secure the repayment of the purchase-money ; nor has he any right to retain possession until he is repaid the amount paid upon the void contract of purchase.

In the present case, the agreement was void and could not have been enforced against either party. As the appellee could not have rendered herself personally liable by an express agreement to pay the money advanced to her upon such contract, there can be no implied obligation against her.

The court committed no error in overruling the demurrer to the second and third paragraphs of the reply.

For the error of the court in overruling the demurrer to the first paragraph of the reply, the judgment must be reversed. The evidence is not in the record, and hence we cannot say that the finding and judgment proceeded wholly upon the second and third paragraphs.

The judgment is reversed, with costs ; and the cause is remanded, with directions to the court below to sustain the demurrer to the first paragraph of the reply, and for further proceedings in accordance with this opinion.

DAILY ET AL. v. THE CITY OF COLUMBUS.

PLEADING.—*Exhibits.*—Where the averments of a pleading are contradicted by an exhibit referred to in such pleading, the exhibit will control.

CITY COUNCIL.—*Power to Borrow Money.*—Where a city negotiated her bonds to raise means to construct water-works, and the city treasurer misapplied a part of the funds so realized, leaving debts unpaid on account of such works, it was competent for the city council to issue and sell other bonds to make up such deficiency.

SAME.—*Statutes.*—By the statute of 1871 (Acts 1871, p. 8), the common council of a city is authorized to issue and sell such bonds of the city as, in the discretion of the council, may be necessary to carry out contracts there-

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tofore made in and about the construction of water-works, and to fully complete such works; and by the act of March 7th, 1873, it may provide for paying ten per cent. interest on such bonds.

From the Bartholomew Circuit Court.

S. Stansifer, for appellants.

N. T. Carr and *F. T. Hord*, for appellee.

BUSKIRK, C. J.—This was a proceeding on the part of the appellants, to enjoin the appellee from issuing and selling certain bonds.

The complaint states, substantially, that, on the 24th of September, 1870, the common council of the city of Columbus provided by ordinance for the construction of water-works; that under said ordinance said water-works were completed at a total cost of fifty-three thousand two hundred and sixty-two dollars and forty-four cents, as shown by a report of the water-works committee, which is made a part of the complaint; that the cost of printing bonds, etc., and expenses of selling bonds, being five hundred and twenty-seven dollars and ninety-five cents, was not to come out of that fund; that the council created a fire department, to be operated in connection with the water-works, at a cost of two thousand nine hundred and forty-nine dollars and thirty-eight cents, as shown by said exhibit; that the city, by its ordinance of September 27th, 1870, provided for issuing and selling bonds, to aid in the construction of water-works; that the city sold forty-five thousand dollars of said bonds, and gave to Holly, one of the contractors, a bond for five thousand dollars on his debt; that June 27th, 1871, the city issued bonds for fifteen thousand dollars, to aid in the construction of the water-works, which were sold by said city; that all of said bonds issued and sold amount to sixty-five thousand dollars; that the fire department and water-works were the only species or character of public works in which the city was engaged or connected with; that on the 18th of June, 1873, the city council adopted an ordinance, which is made a part of the complaint, providing for the forms of bonds, etc., and that the city will issue

and sell said bonds unless restrained; prayer for an injunction, etc.

The appellee answered in two paragraphs. A demurrer was sustained to the first and overruled to the second. The appellants elected to abide by the judgment on demurrer to the second paragraph, and final judgment was rendered for appellee.

The error assigned calls in question the correctness of the action of the court in overruling the demurrer to the second paragraph of the answer.

Did the court err in overruling the demurrer?

It states, substantially, that the ordinance authorizing the issue of the bonds sought to be enjoined was regularly and legally adopted by a two-thirds vote of the common council of the city of Columbus, at its regular meeting; that said bonds were sought to be issued for the sole purpose of the construction and completion of said water-works, and to pay debts contracted in their construction; that the city, in the year 1870, began the construction of the water-works to furnish the city with wholesome water, and adopted what is known as the "Holly plan," which consists of a suction pump operated by a steam engine, by which a supply of water is drawn from Driftwood river, and is forced through a series of conducting pipes along the various streets of the city; that the citizens are furnished with wholesome water only through said conducting pipes; that said water-works, on the day of the passage of said last ordinance, had so far progressed that said suction pump, force pump, and engine were provided, and certain mains or pipes were laid and established on parts of Washington, Mechanic, Sycamore, and California streets of said city, running north and south through said city, and also on parts of Vernon, Tipton, Harrison, Jefferson, and Irwin streets, running east and west, by which pipes the citizens of said city residing on said streets were being supplied with wholesome water at the general expense of said city, at and for a mere nominal price per year for the use thereof; but that said water-works, on the day of the passage of said ordinance, were not and are not now completed, in this, that parts of Vernon and

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Tipton streets, and all of Walnut, Delaware, Liberty, and North streets, running east and west through said city, and Jackson, Brown, Franklin, Pearl, Chestnut, and Wilson streets, running north and south in said city, are not now, nor were, at the time of the passage of said ordinance, furnished with such conducting pipes, and that the citizens of said city, residing on said streets and parts of streets, were not then, and are not now, supplied with such wholesome water from said works as other citizens of said city are supplied on other streets thereof; that the city of Columbus, at the time of commencing said water-works and continuously since, has intended to lay conducting pipes on the said streets not furnished, as rapidly as the city could procure funds therefor, and has continued to lay the same as demand arose, and the city was able; to aid in constructing said water-works, the city on the 7th of February, 1871, issued bonds for the amount of fifty thousand dollars, which were placed in the treasurer's hands; thereafter the city, knowing that said sum was not sufficient for said works, on the 3d of July, 1871, issued fifteen thousand dollars more of bonds; that forty-eight thousand dollars of said sums were paid out on said works, and on the — day of September, 1871, the said treasurer refused to pay the orders of said city on said fund, or to disburse the balance of said bonds, to wit, seventeen thousand dollars, and has continuously refused to pay or account for the same; that immediately on the termination of said treasurer's term of office, the city of Columbus instituted suit against said treasurer on his official bond for said money, and said suit is now pending in the Bartholomew Circuit Court, which said treasurer and his sureties are defending, on the ground that they are not responsible for said money, in that the money was placed by the common council in the bank of McEwen & Sons, who became insolvent, and that there is no liability therefor; that at the time of said treasurer's failure to pay over and account for said money, the city took all necessary steps to compel such payment, but knowing the uncertainties and delays of judicial proceedings, and that said money would not be made for some four or five years, and the

city having contracted debts in the construction of said works to the amount of about twelve thousand dollars, and said debts being due and payable, and the city being liable to be sued for the same, and having no other means of raising said money in time to pay said debts and save said city from suits, and judging that a necessity existed for the immediate completion of said works, and having no other means in their control, the common council resolved to issue said bonds mentioned in the complaint.

The principal ground upon which the injunction was asked was, that the city did not owe the amount for which the bonds were being issued. It is averred in the complaint that the water-works had been completed at the cost of fifty-three thousand two hundred and sixty-two dollars and forty-four cents, and an exhibit was referred to and filed with the complaint, showing the cost of water-works and fire department. An examination of the exhibit shows that a mistake has been made either by the pleader or the one who prepared the exhibit. The exhibit only shows the expenses and cost of the water-works up to February 8th, 1872, when it was made, and it appears therefrom that the cost of the water-works alone was sixty-nine thousand eight hundred and sixteen dollars and thirty-nine cents, instead of fifty-three thousand two hundred and sixty-seven dollars and forty-four cents. Add to this the cost of the fire department, two thousand four hundred and two dollars and thirty-eight cents, and service-pipe and pay of superintendent, and an indebtedness of seventy-three thousand and sixty-five dollars and seventy-seven cents is shown. The answer in question shows that other debts have been created since the making of said report, in the extension of the water-works to other parts of the city, and that further expenditures will have to be made for the same purpose. When the averments of a pleading are contradicted by an exhibit referred to in such pleading, we are governed by the exhibit. *Gilmore v. The Board, etc.*, 35 Ind. 344.

It also shows that the sum of seventeen thousand dollars, which had been realized by the sale of bonds, had been mis-

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appropriated, and had not been applied to the purposes intended. If such sum is finally lost to the city, it will constitute no valid reason why the city should not provide for the payment of her just obligations. If, on the other hand, it shall be collected, it can be used in the redemption of the bonds proposed to be issued, or be devoted to other city purposes. We think the answer shows an indebtedness approximating the amount of the proposed issue of bonds.

In the act of 1871 (Acts 1871, p. 8) is the following provision: "The common council is hereby authorized to issue, and sell all such bonds of said city, as in their judgment may be necessary to carry out and perform any and all contracts heretofore made in and about the construction of such water-works, and to fully complete said works."

It is manifest that the city was indebted for the construction of her water-works, and that she will have to expend further sums in the completion of such works. By the above act, ample power is conferred upon the common council to issue and sell bonds to carry out contracts already made and such as may be made to fully complete such works. The indebtedness being conceded, and the power admitted, it was within the sound discretion of the common council to collect the amount by taxation, or procure the same by the sale of the bonds of the city. There does not seem to have been any abuse of such discretion.

It is also objected that the bonds proposed to be issued were to bear ten per cent. interest. This is no objection.

By the act of March 7th, 1873 (Acts 1873, p. 63), the common council of any city engaged in establishing and constructing water-works for furnishing the city with wholesome water may, by a vote of two-thirds of the members of such council, issue the bonds of said city, bearing interest at any rate, not exceeding ten per cent., etc.

We think the matters stated in the second paragraph of the answer constitute a defence, and that the ruling of the court thereon was correct.

The judgment is affirmed, with costs.

MCCAFFREY v. CORRIGAN ET AL.

JUDGMENT.—*Estoppel by.*—*Married Woman.*—A mortgage was executed by the owner of certain real estate, in which his wife did not join. The mortgage recited that it was given to secure the purchase-money of the land mortgaged. In a subsequent suit to foreclose the mortgage, the wife was made a party defendant with her husband, the mortgagor, and the complaint alleged that the mortgage was given for purchase-money. All the defendants made default, and the court found the facts to be as charged in the complaint, and rendered judgment accordingly. The land was sold on the decree of foreclosure. Afterward, the mortgagor died, and his widow brought her action against the parties in possession under the sheriff's deed, for one-third of the land.

Held, that she was estopped by the judgment of foreclosure from asserting title and from controverting the fact recited in that judgment, that the mortgage was given for the purchase-money of the land. If the mortgage was not, in fact, given for purchase-money, she should have set up that defence in the foreclosure proceeding.

From the Jennings Circuit Court.

G. W. Swarthout, for appellant.

C. A. Korbly, for appellees.

DOWNEY, J.—This was a complaint for the partition of certain real estate, of which it is alleged the plaintiff and the defendants are "joint tenants in common." The plaintiff claimed one-third of the land as the widow of Michael McGinty, deceased. Since the death of Michael McGinty, it may be inferred that she has again been married, and thus the change in her name may be explained.

The defendants pleaded, for a second paragraph of answer, as follows: That the plaintiff is estopped from claiming any title to or interest in the real estate described in the complaint, or any part thereof, because, they say, that heretofore, to wit, on the 13th day of December, 1858, one Michael McGinty was the owner of said land described in the complaint, and of which the plaintiff claims partition; that he had an estate in fee simple therein; that on the same day he and one John McGinty, who owned thirty acres of land adjoining said real estate, executed and delivered to one James Gavin a mortgage upon the

49	175
124	558
49	175
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east half of the north-east quarter of section nine, in township six of range eight east, in said county, which included the real estate described in the complaint, to secure the payment of three notes executed by said John McGinty and Michael McGinty to the said James Gavin, the first due the 1st of July, 1859, the second due the 1st of July, 1860, and the third due the 1st of July, 1861, for one hundred dollars each, bearing interest from date, given for the purchase-money of said real estate; that said John and Michael McGinty duly acknowledged said mortgage, and the said Gavin caused the same to be recorded in the recorder's office of Jennings county, within ninety days after the execution thereof; that afterward, in 1859, the said James Gavin sold and indorsed two of the notes described in said mortgage to one John R. Conyers; that afterward, on the 15th day of February, 1860, one of the notes last named being due and unpaid, the said John R. Conyers commenced an action to foreclose said mortgage, in the Jennings Circuit Court, to which action he made the said Michael McGinty, John McGinty, Ellen McGinty, the wife of said Michael McGinty, and Nelly McGinty, wife of said John McGinty, parties defendants; that in his complaint the said John R. Conyers alleged that said Michael McGinty and John McGinty executed their notes, copies of which he filed with his complaint, to James Gavin, giving their dates, amounts, etc., as above, and at the same time made and executed to the said Gavin a mortgage, conveying the real estate therein described to the said Gavin to secure the said two notes, with another note of the same amount, due July 1st, 1861, a copy of which mortgage he filed with his complaint. It is further alleged, that the said notes and said mortgage were given as a part of the consideration of the real estate therein described, which was recited in the mortgage, a copy of which was filed with said complaint. Said Conyers also alleged in his complaint that the said two notes were duly assigned to him by indorsement, and prayed judgment on said notes for two hundred and fifty dollars, without relief, etc., and a foreclosure of said mortgage and sale of the mortgaged premises, etc. It is

also alleged, that said Conyers caused a summons to be issued upon said complaint, which was duly served, on the 21st day of February, 1860, on said John McGinty and Nelly McGinty, his wife, personally, and returned accordingly ; and afterward, on the 1st day of March, 1860, said Conyers caused an *alias* summons to be issued on the complaint by the clerk of said court, which was delivered to the sheriff on the same day ; that on the 2d day of March, 1860, the sheriff duly served the same on the said Michael McGinty and Ellen McGinty, personally, and made due return on said summons ; that afterward, to wit, at the March term of said court, on the 14th day of March, 1860, the said Michael McGinty and Ellen McGinty, and John McGinty and Nelly McGinty, his wife, having been duly and legally served with process in said action, wholly made default, and that the said Jennings Circuit Court had full jurisdiction of their persons and of the said cause of action ; that on the same day the said Gavin appeared in court and became a party to said action, and filed an answer and cross complaint, setting up the note still held by him, secured by said mortgage, and also praying judgment for the foreclosure of said mortgage. Whereupon the cause came on for trial upon said complaint, service of summons, cross complaint, and default aforesaid ; and it appeared to the satisfaction of said court that process had been duly served on said defendants more than ten days before the first day of that term of the court ; and said cause being submitted to the court for trial, and the court having heard all the facts in the premises, found and considered that said John McGinty and Michael McGinty on the 13th day of December, 1858, executed the mortgage exhibited with the complaint, on the real estate described, to secure the payment of the said notes, which were given for the purchase-money of said real estate ; and the court thereupon rendered judgment upon said finding for the amount due on said notes, and for foreclosure of said mortgage, and barring the equity of redemption of said defendants in said real estate ; that said Conyers and Gavin afterward caused an order of sale

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to be issued by the clerk of said court, under the seal of said court, to the sheriff of said county ; and afterward the sheriff advertised and sold fifty acres of the real estate to Edward Murphy, and the same was duly conveyed to him by the sheriff ; and afterward another order of sale was issued, and thirty acres, the residue of the land, was sold thereon to James Corrigan, and a sheriff's deed made to him therefor ; that said James Corrigan died, and afterward his widow died, and the other defendants became the owners of the land so purchased by him by descent, alleging a partition of the land among them. It is alleged that the judgment of Conyers and Gavin against Michael McGinty and John McGinty, and Ellen and Nelly McGinty, their wives, remains in full force and unreversed ; that Ellen McCaffrey is the widow of said Michael McGinty, and was a party to said action of foreclosure, and claims the one-third of the real estate described in the complaint as the widow of the said Michael McGinty, and not otherwise ; but these defendants say that she is estopped from so claiming the same, because the said mortgage and judgment are conclusive upon her, that the said mortgage was given by her said husband, Michael McGinty, to said James Gavin, to secure the unpaid purchase-money for said real estate ; wherefore, etc.

A demurrer by the plaintiff to this paragraph of the answer, on the ground that it did not state facts sufficient to constitute a bar to her action, was overruled by the court.

The plaintiff then replied to the second paragraph of the answer as follows : That the mortgage mentioned in the second paragraph of the answer as given by John and Michael McGinty to James Gavin, was not given for the purchase-money of all of the land mentioned in the said mortgage, but, on the contrary, was only given for the thirty acres owned and mortgaged by John McGinty, which thirty acres said James Gavin sold to said John McGinty at the time and date of said mortgage, which was all the land said James Gavin ever owned of the land described in said mortgage ; that the recital in said mortgage that it was given for the purchase-

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money of said land has reference only to the purchase-money of the thirty acres, and no more, as will more fully appear from Gavin's deed, a copy of which is filed herewith, etc., said Michael McGinty only signing said notes and giving the mortgage on his fifty acres of land as security, and not as purchaser, neither was any of the money secured by the mortgage purchase-money for said fifty acres of land; that this plaintiff never signed said mortgage, and consequently had no cause of defence or rights to settle in said foreclosure suit; that after the said foreclosure and sale of said premises, the said Michael McGinty, husband of this plaintiff, departed this life, leaving the plaintiff, his widow, and entitled to one-third of said land, by the twenty-seventh section of the statute of descents; that the defendants are not innocent purchasers, etc.; wherefore, etc.

A demurrer was filed by the defendants to this paragraph of the reply, on the ground that the same did not state facts sufficient to avoid their answer. The demurrer was sustained by the court. Thereupon there was final judgment for the defendants.

The errors assigned are:

1. Overruling the demurrer to the second paragraph of the answer.
2. Sustaining the demurrer to the first paragraph of the reply.

As to the first alleged error, counsel for appellant says, that to create an estoppel by record, there must have been some act of the party sought to be estopped upon which to base the record. The answer, it is urged, does not contain a complete record of the foreclosure suit referred to therein, and no copy of the mortgage is set out; but the defendants proceed upon the theory that the plaintiff signed the mortgage, or that the mortgage was given for the purchase-money of the land; and it is insisted that the paragraph of the answer is bad, because it does not set out a full and complete record of the foreclosure suit on which the defendants rely. In our opinion, it was unnecessary to file a copy of the record in the foreclosure suit with

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the paragraph of the answer. This is so decided in *Lytle v. Lytle*, 37 Ind. 281, and that case has been followed in several other cases.

With reference to the position assumed by counsel, that, to create an estoppel by record, there must have been some act of the party sought to be estopped upon which to base the record, we think it may be said, that it is enough if a fact be alleged in a complaint or other pleading, and found to be true upon a trial, or be admitted by the default of the party to the action, who should controvert it if not true, in order to estop the party seeking afterward to deny such fact.

It was recited in the mortgage, that the debt was for the purchase-money of the land, both the thirty acres and the fifty acres; that fact was alleged in the complaint to foreclose the mortgage, to which the plaintiff in this action was a party. She had legal notice of the pendency of that action and failed to appear and controvert the allegation.

The judgment of the court, so far as it concerns her, was predicated upon the fact thus alleged by the plaintiff in that action, and admitted, or not denied, by her. Upon this admission by her default, the judgment of the court as to her interest in the land was predicated, and upon the faith of the judgment the purchase was made at the sheriff's sale, and the land is now held.

The question is not now whether, in fact, the mortgage was for the purchase-money of the land, of which the plaintiff is now claiming the one-third. That question was settled by the judgment of the court in the foreclosure case, to which the plaintiff was a party. She might then have controverted that fact, had she been inclined to do so, and had the fact been otherwise than as alleged. But we think she cannot now, in this way, controvert that fact. *Comparet v. Hanna*, 34 Ind. 74; *Gavin v. Graydon*, 41 Ind. 559; *May v. Fletcher*, 40 Ind. 575; *Fischli v. Fischli*, 1 Blackf. 360. Many other cases in this court might be cited.

The first paragraph of the reply is in contradiction of the record in the foreclosure suit. It alleges that the mortgage

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was not given for purchase-money of the land of which the plaintiff is claiming a part, but was given exclusively for the purchase-money of the thirty acres conveyed to, and mortgaged by, John McGinty, which, it is alleged, was the only land conveyed by Gavin.

Counsel for appellee says the reply admits the existence of the record on which the estoppel is based, but asserts, in substance, that the record does not speak the truth, and for this reason is bad.

Counsel for the appellant insists, that there should have been an issue of fact formed, whether or not Michael McGinty, the husband of the plaintiff, was or was not a purchaser of the land in question from Gavin, and whether or not he executed the mortgage for purchase-money.

We think the demurrer was properly sustained to the reply, for the reason stated by counsel for the appellee. To allow the reply to stand, would be to allow the plaintiff to aver the fact to be directly the opposite of what was alleged, and found to be true, in the foreclosure suit. This she cannot do.

There was no error in sustaining the demurrer to the first paragraph of the reply.

The judgment is affirmed, with costs.

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SUPREME COURT.—*Certificate of Clerk to Transcript.*—The certificate of the clerk to a transcript, on appeal to the Supreme Court, which only certifies that the transcript contains a true and correct copy of the judgment and decree, is insufficient.

From the Fayette Circuit Court.

W. Morrow, N. Trusler, and J. M. Wilson, for appellants.
J. C. McIntosh, for appellee.

49	181
180	190
49	181
147	302
49	181
149	148
49	181
163	480
49	181
154	48
155	151
155	300
49	181
165	49

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BUSKIRK, C. J.—The appellee has moved to dismiss this appeal for want of a sufficient certificate to the transcript, and this motion is insisted upon in the brief of counsel. The certificate is as follows :

“State of Indiana, Fayette County, ss:

“I, Gilbert Trusler, clerk of the Fayette Circuit Court, within and for said county, do hereby certify the above and foregoing to be a true and correct copy of the judgment and decree of said court in the above entitled cause, as the same appears of record on file in my office.

“Witness my name and the seal of said court, at Connersville, this 12th day of February, 1874.

[Seal.]

“GILBERT TRUSLER, Clerk.”

It will be observed that the clerk only attempts to certify that the transcript contains a true and correct copy of the judgment and decree. Sections 558 and 559 of the code have definitely settled what shall constitute the transcript on appeal to this court. The form of the certificate is prescribed by section 4 of the act in relation to clerks of the circuit court, 2 G. & H. 12, which reads :

“In all cases where a complete record is dispensed with, the production of the papers and entries relating thereto, and all transcripts thereof, certified and attested with the seal of such court, as complete copies of all the papers and entries of such cause, shall have the same force in evidence as a transcript of a complete record thereof.”

The form of the certificate should be, omitting the formal parts, that the above and foregoing contains complete copies of all the papers and entries in said cause. This is simple, easy to be remembered, and conforms to the language of the statute. The rulings in *Smith v. Jeffries*, 25 Ind. 376, *Tull v. David*, 27 Ind. 377, *Weston v. Lumley*, 33 Ind. 486, and *Wiseman v. Lynn*, 39 Ind. 250, were not made in reference to transcripts on appeal to this court.

We look to the certificate of the clerk to ascertain what is properly in the transcript, and when attested with the seal of the court, it is treated by us as valid and authentic. *Hinton v.*

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Brown, 1 Blackf. 429 ; *Vanliew v. The State*, 10 Ind. 384 ; *Watt v. Alvord*, 27 Ind. 495 ; *Sanford v. Sinton*, 34 Ind. 539 ; *Brunt v. The State*, 36 Ind. 330 ; *Kemp v. Willson*, 39 Ind. 456.

The above form of certificate is proper, when the transcript is a complete copy of all the papers and entries in the cause, but will not answer when only a part of the record is brought up. It is provided by section 558 of the code, 2 G. & H. 273, that, "upon the request of the appellant, or upon being served with notice as aforesaid, and in either case upon the payment of the proper fee, the clerk shall forthwith make out and deliver to the party, at his request, or transmit to the clerk of the Supreme Court a transcript of the record in the cause, or so much thereof as the appellant in writing directs, certified and sealed, to which shall be appended the written directions of the appellant above contemplated, if any."

If no special directions are given in writing by appellant, then the clerk should make out a complete record in the cause. If special directions are given in writing, then the clerk should make out such portions of the record as he may be directed to do, to which he should attach the written directions. In such case, the clerk in his certificate should specify what parts of the record he has copied.

Section 347 of the code, 2 G. & H. 210, provides for taking a reserved question to the Supreme Court, and in such case the certificate must be specific and limited, according to the facts.

The code provides for a transcript of the record. Consequently, the clerk is not authorized to send to the Supreme Court an original paper. *Goodwine v. Crane*, 41 Ind. 335. But the act of March 7th, 1873 (Acts 1873, p. 194), provides for the appointment, in certain cases, of an official reporter to take down the evidence in a cause ; and such act further provides that the long-hand manuscript of the evidence shall be filed with the clerk ; that in case of appeal to the Supreme or superior court in general term, it shall be the duty of the clerk, when so required, to certify such original manuscript of evidence, when the same shall have been incorporated in a bill of

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exceptions, instead of a transcript thereof. In such case, the certificate of the clerk should show that the long-hand manuscript embodied in a bill of exceptions was filed in his office, giving the date of such filing, and that the one certified was the identical one filed.

The certificate attached to the transcript in the present case is wholly defective.

The appeal is dismissed, at the costs of the appellant.

**THE MUNCIE AND NEW BURLINGTON TURNPIKE CO. v.
KEESLING ET AL.**

TURNPIKE.—*Failure to List Lands.*—*Injunction.*—An injunction will lie to prevent the collection of an assessment against the land of the plaintiff, to aid in the construction of a turnpike, under the act of 1867, if the assessors have failed to list any lands within the limits prescribed by the statute, although the lands not listed will not be benefited and nothing can be assessed against them.

From the Delaware Circuit Court.

W. March and *W. Brotherton*, for appellant.

J. S. Buckles and *J. W. Ryan*, for appellees.

DOWNEY, J.—Action by the appellees against the appellant, to enjoin the collection of certain assessments against the lands of the plaintiffs, for the construction of the road of the defendant, under the act of 1867 on that subject. Several objections to the regularity of the assessments are stated in the complaint, and among them, that the assessors did not list all the lands within the prescribed limits, but omitted “all the out-lots and blocks, squares, lots, and other subdivisions embraced within the corporate limits of the city of Muncie.”

A demurrer to the complaint was filed by the company and overruled by the court, and this is the first alleged error.

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There was no error in this. *Turner v. The Thorntown, etc., Co.*, 33 Ind. 317; *The New Haven, etc., Co. v. Bird*, 33 Ind. 325. Other cases have followed these.

Six paragraphs of answer were filed. To the third, fourth, fifth, and sixth paragraphs the plaintiffs demurred, and their demurrers were sustained. So far as these paragraphs set up matters in estoppel, they cannot be sustained under former rulings of this court. We refer to *Hopkins v. The Greensburg, etc., Co.*, 40 Ind. 44; *The Greensburgh, etc., Co. v. Sidener*, 40 Ind. 424; *Williams v. The Greensburgh, etc., Co.*, 42 Ind. 171; *Manford v. The Pleasant Grove, etc., Co.*, 42 Ind. 293; *Pavy v. The Greensburgh, etc., Co.*, 42 Ind. 400; *Hendricks v. The Indianapolis, etc., Co.*, 42 Ind. 562.

So far as the answers rely on the fact that the omitted lands were not benefited, they are bad, for the reason stated in *Turner v. The Thorntown, etc., Co.*, *supra*, and *The New Haven, etc., Co. v. Bird*, *supra*. The lands within the prescribed bounds must be listed, whether anything is assessed against them or not.

As to the fifth paragraph of the answer, it seems to have been pleaded to bar a recovery of the two-thirds of the assessments which had already been paid. As no judgment was asked or obtained for such recovery, it seems unnecessary to decide anything with reference to that paragraph.

A question is made as to the taxation of costs, but no action was asked or had on that subject in the circuit court. We cannot decide it until it has been acted on in the circuit court.

The judgment is affirmed, with costs.

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133	306
49	186
154	179
49	186
157	102

CRIMINAL LAW.—Constitutional Law.—Indictment.—In the act (2 G. & H. 455) defining what shall constitute combining for the purpose of committing a felony, and fixing penalties therefor, the proviso that it shall not be necessary in the indictment to charge the particular felony which it was the purpose or object of the persons combining to commit is unconstitutional, against natural law, and void.

SAME.—Conspiracy.—Robbery.—Pleading.—The averments of an indictment for combining to commit a robbery should be as specific and full in describing the robbery as in an indictment for that felony; and to charge a combining for the purpose of taking from the person forcibly and feloniously is not sufficient, but it is necessary, also, to allege that it was to be done “by violence” or “putting in fear.”

SAME.—Overt Act.—It is well settled that, to constitute the offence of conspiracy, it is not necessary that any act should be done in pursuance of the conspiracy.

From the Marion Criminal Circuit Court.

S. A. Huff, J. W. Nichol, and F. J. Mattler, for appellant.

C. A. Buskirk, Attorney General, and J. M. Cropsey, Prosecuting Attorney, for the State.

BUSKIRK, C. J.—The appellant was indicted and convicted under the following statute:

“Sec. 1. Be it enacted by the General Assembly of the State of Indiana, that any person or persons who shall unite or combine with any other person or persons for the purpose of committing a felony, or any person or persons who shall knowingly unite with any other person or persons, or body, or association or combination of persons, whose object is the commission of a felony or felonies, shall be guilty of a felony and upon conviction shall be fined in any sum not exceeding five thousand dollars, and be imprisoned in the state prison not less than two, nor more than twenty-one years: Provided, that in any indictment under this section, it shall not be necessary to charge the particular felony which it was the purpose of such person or persons, or the object of each [such] person or persons, or body, association or combination of persons to commit.”

The indictment was as follows:

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“The grand jurors for the county of Marion, and State of Indiana, upon their oath present that James Landringham, on the 12th day of November, A. D. 1874, at and in the county of Marion, and State aforesaid, did unlawfully and feloniously unite, combine, and conspire with Thomas King, for the purpose of making an assault upon one Thomas J. Barlow, and for the purpose and with the intent then and there of feloniously and forcibly taking from the person of the said Barlow ten United States treasury notes, of the denomination of ten dollars each and of the value of ten dollars each, ten national bank notes, of the denomination of ten dollars each and of the value of ten dollars each, twenty United States treasury notes, of the denomination of five dollars each and of the value of five dollars each, and twenty national bank notes, of the denomination of five dollars each and of the value of five dollars each, all of said notes being the personal goods of said Barlow, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.”

Motions were made and overruled to quash the indictment and in arrest of judgment, and these rulings are assigned for error, and present for our decision the question, whether the indictment is sufficient. If the above quoted act is valid in all of its parts, then it was not necessary to charge or even to name the felony intended to be committed; for it is expressly declared in the proviso that it shall not be necessary to charge the particular felony which it was the purpose of such person or persons, or the object of such person or persons, or body, association, or combination of persons to commit. We are very clearly of the opinion that the proviso is in conflict with the constitution, and against natural right, and hence is absolutely void. If the indictment need not charge the particular felony intended to be committed, the accused would have no means of knowing, before the trial commenced, what offence he was charged with, and consequently would have no opportunity of preparing for his defence. The question was so fully considered by this court in the case of *McLaughlin v. The*

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State, 45 Ind. 338, that we do not deem it necessary to re-argue or re-state it.

The proviso being void, it was necessary for the indictment to charge the particular felony which the appellant had conspired, united, or combined to commit; and this leads us to inquire whether the indictment does properly charge any particular felony. It obviously would not be sufficient to name the particular felony intended, but the indictment should contain averments sufficient to show what particular felony the accused had united and combined to commit. The averments should be as specific and full as in an indictment charging the commission of such felony. It was evidently the purpose of the draughtsman to charge the appellant with uniting and combining with Thomas King to commit a robbery, but we think such offence is not sufficiently charged. The statute thus defines the crime of robbery: "Every person who shall, forcibly and feloniously, take from the person of another any article of value by violence, or putting in fear, shall be deemed guilty of robbery." 2 G. & H. 442, sec. 18. The indictment should have used the words "by violence" or "putting in fear." Bicknell Crim. Prac. 319; 2 Arch. Crim. Pr. & Pl. 417, 418; *Seymour v. The State*, 15 Ind. 288.

It is contended by counsel for appellee that the use of the word "forcibly" dispenses with the use of the words "by violence" or "putting in fear." The statute and approved forms use both words "forcibly" and "by violence."

The court instructed the jury that it was unnecessary for the indictment to charge any particular felony which the appellant had united and combined to commit. The jury must have understood from such charge that it was not necessary for the State to prove any particular felony.

The appellant asked the court to charge the jury that there could be no conviction, unless it was proved that he had committed some overt act to carry out the purpose contemplated by the conspiracy. It is well settled, that it is not necessary, to constitute the offence of conspiracy, that any act should be done in pursuance of the conspiracy. See 4 Chitty's Black-

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stone, top page 98, side p. 136, and note 31, and authorities there cited.

The judgment is reversed, with costs; and the cause is remanded for further proceedings in accordance with this opinion; and the clerk will give immediately the necessary notice for the return of the prisoner.

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157	466

NEW TRIAL.—*Newly-Discovered Evidence.*—An application for a new trial on the ground of evidence discovered since the term at which the action was tried will not be granted, where the newly-discovered evidence is of the same kind given on the trial, and merely cumulative; or where such evidence is of facts not recollected by the party when testifying on the trial; or where such evidence could not change the result; but it should be granted where the newly-discovered evidence, although corroborative of evidence given on the trial, consists of admissions of the adverse party.

SAME.—*Demurrer.*—*Bill of Exceptions.*—In an application for a new trial on the ground of evidence discovered after the term at which the trial was had, a demurrer to the complaint admits the original evidence and that newly-discovered to be as stated in the complaint, and no bill of exceptions is necessary to show what the evidence on the trial was.

From the Kosciusko Circuit Court.

C. Clemens, for appellant.

W. S. Marshall and *J. H. Carpenter*, for appellee.

WORDEN, J.—Complaint by the appellant against the appellees, for a new trial. Demurrer to the complaint for want of sufficient facts sustained, and judgment for the defendants. The assignment of errors brings in review the correctness of the ruling on the demurrer.

The case in which a new trial was asked was this: Klick placed a note in the hands of the appellant herein for collection, and took from him a receipt therefor, as follows:

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“PIERCETON, INDIANA, May 4th, 1867.

“Received of Philip Klick one note on John Quine for collection—two hundred and ninety-two dollars—with twenty-two dollars and forty cents credit.

(Signed.)

“C. C. HUMPHREYS, Attorney.”

Afterward, Klick sued Humphreys in the court of common pleas of said county for negligence in failing to use proper diligence in the collection of the note, when it could have been collected ; whereby the plaintiff was damaged.

Issues were made up, and the cause was tried by the court, resulting in a finding and judgment for the plaintiff in that action for the sum of one hundred and seventy-seven dollars and costs. This action was brought to obtain a new trial in that, on the ground of evidence discovered by the plaintiff in this cause since the term at which that was tried.

It appears by the complaint herein, that on the trial of the original action evidence was given that Humphreys received the note for collection, as specified in the receipt ; that Quine had property out of which the debt could have been made, but that Humphreys made no effort to collect the same, but suffered Quine to move away without collecting the claim. It was testified to also by Klick, that the sum of one hundred and seventy-seven dollars remained unpaid on the note. On that trial, Humphreys also testified as a witness, stating, amongst other things, that Quine was in failing circumstances, and was a greater portion of his time in Toledo, Ohio, and that when Klick gave him the note he told him not to sue on it, but to see Quine, when he came out from Ohio, and ask him for it (the money), saying that he did not want to make any costs upon it against Quine. Klick, however, testified that he did not give Humphreys any instructions about the collection of the note ; that he took the receipt from him, and did not give him any instructions not to collect the note.

Humphreys offered other evidence tending to show that Quine was insolvent, and that the money could not have been collected from him.

A portion of the evidence alleged to have been newly-dis-

covered was the same in kind with that given on the trial of the former action to establish the insolvency of Quine, and was merely cumulative. This part of the case need not, therefore, be further considered, as where the newly-discovered evidence is merely cumulative, a new trial will not be granted on account of such newly-discovered evidence. This point has been so often decided that reference to authority can hardly be deemed necessary.

It is alleged in the complaint, in substance and as one of the grounds upon which a new trial is asked, that at the time of the former trial Klick had the note in his possession, but the plaintiff herein then had no recollection of the manner in which he, Klick, became repossessed thereof. But he since recollects, and now avers, that he returned the note to Klick, as he had no hopes of being able to collect it, and that Klick agreed to destroy or cancel the receipt; that he did not testify to this fact on the trial, for the reason that he then had no recollection of it. This can hardly be regarded as a good ground for a new trial.

In the case of *Bond v. Cutler*, 7 Mass. 205, 207, the court said: "A want of recollection of a fact, which by due attention might have been remembered, cannot be a reasonable ground for granting a new trial. For a want of recollection may always be pretended, and may be hard to be disproved."

Another point in relation to which evidence is alleged to have been newly-discovered is this, that Klick collected one hundred dollars on the note from Quine, without the knowledge of the plaintiff in this action. We think, however, that the plaintiff herein must have had credit for this hundred dollars in the original action. The note was for two hundred and ninety-two dollars, with a credit upon it of twenty-two dollars, rejecting cents, thus leaving on the note two hundred and seventy dollars, saying nothing of interest. Deducting the one hundred dollars from the note, and adding seven dollars for interest, and we have the sum found by the court. We do not know that this was the process by which the court arrived at the amount, but the inference from the amount

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found is, that Humphreys had credit for the hundred dollars alleged to have been collected by Klick. Klick, it will be remembered, testified that there was one hundred and seventy-seven dollars due on the note.

What we have said disposes of all the grounds, we believe, on which a new trial was sought except one, which remains to be considered.

The plaintiff avers, in substance, that, although he made diligent search and inquiry for all evidence that might be of any benefit to him on the original trial, he did not discover what he can prove by Quine, the maker of the note, nor did Quine communicate to him the facts until after the term at which the cause was tried; that he can prove by Quine "that said Klick often told the said Quine that the plaintiff was not to sue on the said note, and that the same was left with this plaintiff for the convenience of Quine." Quine's affidavit was produced, in which he states, amongst other things, as follows: "While I was still residing in the town of Pierceton, in the State of Indiana, Mr. Klick informed me that he had left the said note or due-bill with Mr. Humphreys, but had not authorized him to sue on the same, and did not intend to sue upon it himself, but had left it with Mr. Humphreys for my convenience merely, and that said Klick frequently called upon me during the years 1867 and 1868, and while I was still residing in said town of Pierceton, in the State of Indiana, and demanded payment of the note."

This evidence is strongly corroborative of that of Humphreys on the trial of the original cause, in which he states, that when Klick gave him the note he told him not to sue upon it, but to see Quine and ask him for the money, saying that he did not want to make any costs upon it against Quine. It is very clear that if Humphreys was instructed by Klick not to sue, he should not be held liable for not suing. Nor can we say that if the newly-discovered evidence had been given, it would not probably have changed the result. Diligence is sufficiently shown. The evidence, although directed to the same point as that of Humphreys on the former trial, in

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respect to the point that he was not to sue on the note, is altogether different in kind. It is, therefore, not cumulative merely. *Humphries v. The Administrators, etc.*, 12 Ind. 609.

The admissions of a party of a given fact are not cumulative of other evidence tending to prove the same fact. See 3 Graham & W. New Trials, 1048, *et seq.*; *Zouker v. Wiest*, 42 Ind. 169.

It is objected by the appellees, that the evidence on the original trial is not set out in any bill of exceptions, and that the complaint herein does not set it all out. But it is unnecessary, for the purposes of this case, that it should have been set out in a bill of exceptions; and, on demurrer, we must take the original evidence to have been such as is alleged in the complaint herein.

The demurrer admits the original evidence and that newly-discovered to be as stated. *Sanders v. Loy*, 45 Ind. 229.

According to the averments of the complaint, there was one item of the newly-discovered evidence, that in relation to the admissions of Klick that Humphreys was not to sue on the note, that entitled the plaintiff herein to a new trial.

The court below, therefore, erred in sustaining the demurrer to the complaint.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

SKILLEN v. THE WATER-WORKS CO. OF INDIANAPOLIS.

LANDLORD AND TENANT.—*Covenant to Repair.*—*Lease of Water-Power.*—In a lease of water-power, as in other leases, no covenant by the lessor to repair will be implied, where none is expressed.

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From the Marion Superior Court.

N. B. Taylor, F. Rand, and E. Taylor, for appellant.

A. G. Porter, B. Harrison, C. C. Hines, W. H. H. Miller, O. Baker, O. B. Hord, and A. W. Hendricks, for appellee.

BUSKIRK, C. J.—This was an action by appellant against appellee, based upon a contract made with Henry R. Selden and others, trustees of the Indiana Central Canal Company, on the 20th of March, 1860, to recover damages for an alleged breach of said contract.

It granted, demised, and leased to the appellant, for the term of twenty years from the 1st day of August, 1861, upon the conditions contained therein, “sufficient water from the Indiana Central Canal, in the city of Indianapolis, to furnish motive power for two run of millstones, grinding at the rate of ten bushels per hour each of good, dry white wheat,” etc.

The appellant therein, “for and in consideration of the right to the use of said water, and of the premises hereby demised,” covenanted and agreed to pay said Selden and others the yearly rent of eight hundred dollars, to be paid in quarterly payments, on the first days of February, May, August, and November; and it was provided, that said appellant “shall not be deprived of the use of water by any act of the parties of the first part or their agents, or by the inadequacy of the supply of water, for more than one month in the aggregate in any one year. And if for the purpose of repairing the canal, preventing breaches, removing bars or other obstructions, or making any improvements to the canal or the works connected therewith, or in consequence of the breaches or the inadequacy of the supply of water, the party of the second part shall be either partially or wholly deprived of the use of any portion of the water-power hereby leased, so as to prevent the operation of any of the hydraulic works usually propelled by the water-power hereby leased, whether for such month or more, such deduction shall be made from the rent, accruing on such portion of the water-power as the said party is so prevented from using, as will bear the same proportion to

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the yearly rent thereof, as the time during which the said party has been deprived of its use bears to the eleven months."

It also provides:

"It is expressly understood and agreed by and between the parties, that for the purpose of preventing or repairing breaches, removing obstructions in the prism of the canal, or for the purpose of making any improvements in the canal, the parties of the first part, their superintendent, or any other authorized agent may cause the water to be drawn out of the canal, and to remain out so long as may be necessary to make such repairs or improvements, and to remove such obstructions, subject to a proportionate reduction of rent, as above mentioned."

It is also provided:

"It is further understood and agreed that the delays occasioned either by high water or freezing will be at the risk of the party of the second part, and no diminution of rent shall take place on account of such delay."

The complaint avers that the water was to be used on the real estate of the appellant.

It also avers that on the 1st day of May, 1870, the appellee acquired said canal by purchase and conveyance.

The appellant then alleges the following breaches of his contract:

That on the 23d day of May, 1870, the aqueduct of the canal across Fall creek broke and let the water out of the canal, and the appellant was by that means deprived of water; that it was the duty of the appellee to repair the aqueduct within a reasonable time; that it could have been rebuilt within thirty days, but that the appellee purposely and wilfully failed and neglected to commence the rebuilding for the period of two months after the break, and did not rebuild the aqueduct and let the water into the canal until about the 24th day of November, 1870; that this delay was to enable the appellee to deposit wooden pipes along and in the bottom of the arm of the canal leading from the main channel thereof, along, by, and near the mill of appellant, to White river, to supply the water-works and buildings of appellee, situated near

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White river, all which works and buildings were constructed by appellee after the execution and commencement of said lease, and after the assignment of said canal to the appellee; that from the 23d day of May, 1870, to the 24th day of November, 1870, appellant was, by said failure and neglect of the appellee, deprived of the use of water from said canal, upon which his mill was dependent; and that upon the 24th day of November, 1870, when water was let into said canal, through the further gross and wilful negligence and want of care of the appellee, the banks of said canal, between said aqueduct and the feeder dam at Broad Ripple, on said White river, broke and gave away, and the water again ran out of the canal and continued to be out of the same until the 25th day of January, 1871, and during this time the appellant's mill was deprived of the use of water; that in laying the pipes in the bed of the canal, and in constructing the gates and apparatus to flow water to and for the use of said water-works and buildings therewith connected, the appellee did so wilfully and purposely lay and construct the same that a large portion, to wit, one-half the water from said canal, was taken away and used for the purpose of said works and buildings, and the appellant had been and was deprived of the use of the quantity of water agreed to be furnished by said agreement for his mill; that, through said wilful and purposed action of the appellee, the appellant had not, from the 25th day of January, 1871, to the date of the commencement of this action, on the 6th day of August, 1872, one-half the amount of water he was entitled to under said agreement.

Damages in the sum of ten thousand dollars were demanded.

The court, in special term, sustained a demurrer to the complaint, and in general term this judgment was affirmed; this ruling is assigned for error, and presents the only question in the case.

The appellant's argument is as follows: "The superior court in special and general term held, on the decisions in the cases of *The Trustees, etc., v. Brett*, 25 Ind. 409, and *Sheets v. Selden*, 7 Wallace (U. S.), 416, that the complaint showed

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no cause of action. But we insist that the case made by the complaint is clearly distinguishable from those cases, and that the lease in this case is different from the lease in both said cases. In this case, there is a covenant to furnish certain water-power for a fixed rent for the period of twenty years. There is a further covenant that Skillen was not to be deprived of the use of the water leased by any act of the lessor for more than one month in the year. We leave out 'by the inadequacy of the supply of water,' to make the point clearer. If, however, he was deprived of the use of the water for a longer period, for the purpose of repairing the canal, preventing breaches in the canal, removing bars or other obstructions, or making any improvements to the canal or the works connected therewith, etc., abatement of rent was provided for. And to prevent or repair breaches, remove obstructions, or to make any improvements in the canal, the company or its agent might let the water out, and let it remain out of the canal so long as necessary to prevent or repair, etc., and delays occasioned by high water or by freezing were subject to no deduction. It results, then, that the cases in which the abatement of rent was to be all the relief the lessee was entitled to are distinctly named in the lease; and the acts complained of by the appellant are not of the kind of either of those named, but were wilful and positive acts done to the injury and deprivation of appellant."

The case of *The Trustees, etc., v. Brett, supra*, was reviewed in the case of *Sheets v. Selden, supra*. The following extract from the opinion in the latter case will show the ruling in both cases. The court say: "In the case of *The Trustees of the Wabash & Erie Canal v. Brett*, 25 Ind. 410, the trustees had leased so much of the surplus water of the canal as might be necessary for the purposes specified. The right was reserved, upon paying for the mill to be built by the lessee, to resume the use of the water leased whenever it might be necessary for navigation, or whenever its use for hydraulic purposes should be found to interfere with the navigation of the canal. It was averred, that the trustees had abandoned that part of the canal,

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and suffered it to go to decay, so that the water-power was destroyed, and the plaintiff's mill rendered valueless. The court held that there was no implied covenant to keep the canal in repair, that the express provision for compensation in one case excluded the implication of such right in all others, and that the plaintiff was without remedy. This case, like the one under consideration, was decided upon a demurrer by the defendants. The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended. A covenant is never implied that the lessor will make any repairs. The tenant cannot make repairs at the expense of the landlord, unless by special agreement. If a demised house be burned down by accident, the rent does not cease. The lessee continues liable, as if the accident had not occurred. If, in such a case, the landlord receives insurance money, the tenant has no equity to have it applied to rebuilding, or to restrain the landlord from suing for the rent until the structure is restored. *The Trustees, etc., v. Brett* is an authority strikingly apposite in this case. In the leases set out in the bill, as in the lease in that case, the parties provided but one remedy for a failure of water. That is, an abatement of the rent in proportion to the extent and time of the deficiency. The contract gives none other. Beyond this it is silent upon the subject. This court cannot interpolate what the contract does not contain. We can only apply the law to the facts as we find them."

In support of the ruling in the above case, the following authorities are cited: *Aspdin v. Austin*, 5 Q. B. 671; *Pilkington v. Scott*, 15 Meeson & W. 657; *Pomfret v. Ricroft*, 1 Saunders, 321, note 1; *Kellenberger v. Foresman*, 13 Ind. 475; *Mumford v. Brown*, 6 Cow. 475; *Moffatt v. Smith*, 4 N. Y. 126; *Leeds v. Cheetham*, 1 Simons, 146; *Loft v. Dennis*, 1 Ellis & E. 474.

The ruling in *The Trustees, etc., v. Brett, supra*, has been adhered to in *Casad v. Hughes*, 27 Ind. 141; *Biddle v. Reed*, 33 Ind. 529; *Biddle v. Reed*, 34 Ind. 379; *Womack v. McQuarry*, 28 Ind. 103.

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To the same effect are *Estep v. Estep*, 23 Ind. 114; *Kutter v. Smith*, 2 Wal. 491; *Doupe v. Genin*, 45 N. Y. 119.

We think this case cannot be distinguished from the foregoing cases, either as to the facts or the law, and they are decisive of this.

The judgment is affirmed, with costs.

COON v. GURLEY.

49 199
164 83

PRINCIPAL AND AGENT.—*Authority of Agent.—Evidence.*—Before one can be affected by the acts and declarations of another as his agent, the agency must be proved; and where the question is as to the extent of the agent's powers, it must first be shown that they extend to the acts or declarations in question.

From the Huntington Circuit Court.

J. G. Branyan, ——— *Watkins, F. M. Finch, and J. A. Finch*,
for appellant.

L. P. Milligan and W. W. Woollen, for appellee.

DOWNEY, J.—Action by the appellee against the appellant, to recover for real estate sold and conveyed, and to enforce a vendor's lien for the amount. Answer by a general denial, and two special paragraphs. Reply in denial of the special paragraphs. Trial by the court and finding for the plaintiff. A motion for a new trial was made by the defendant, which was overruled, and there was final judgment for the plaintiff for the amount of the finding.

The only error properly assigned is the overruling of the motion for a new trial.

There were two causes or reasons for a new trial stated in the motion, viz.:

1. That the finding of the court was contrary to law and the evidence; and,

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2. The refusal of the court to allow the defendant, when testifying, to state that he had complied with the terms of the purchase, as he alleged the same was agreed to by the agent of the plaintiff, and that by such terms the part of the purchase-money remaining unpaid was not yet due.

We have examined the case with reference to both of these grounds, and are of the opinion that the court committed no error in refusing to grant a new trial.

The case is argued mainly on the second ground for a new trial.

The sale was made by the plaintiff through an agent. The question was as to the authority of the agent. It did not appear that the agent had authority to make the contract, as is insisted upon by the defendant. It could not have availed the defendant anything to prove an agreement with the agent, which the agent had no authority from his principal to make, and then prove a compliance with such agreement. The agency must first be proved before the principal can be affected by the declarations or acts of the agent. And where the question is as to the extent of the powers of the agent, it must first be made to appear that they extend to the acts or declarations in question, before they can bind the principal. *Rowell v. Klein*, 44 Ind. 290; *Rathel v. Brady*, 44 Ind. 412.

The judgment is affirmed, with ten per cent. damages and costs.

LONG ET AL. v. EMERY.

From the Kosciusko Circuit Court.

J. E. McDonald, J. M. Butler, F. B. McDonald, and G. C. Butler, for appellants.

W. S. Marshall, D. Turpie, and H. D. Pierce, for appellee.

Moon v. Vancuren.

BUSKIRK, C. J.—The appellee has pleaded in bar of the assignments of error, that the final judgment was rendered in this case on the 11th day of January, 1871, and that the transcript in this cause was not filed until the 30th day of April, 1874.

The appellants have attempted to answer the plea by showing, by affidavit, that there was an agreement between counsel that no technical objection was to be urged in this court to the record, that two appeals had been taken in this cause prior to the present one, which had been dismissed for failure to file briefs, and that the present record was filed as a substitute.

An examination of the records of this court shows that two appeals have been taken in this case; that both of them were dismissed for failure to file briefs; that leave was granted both times to withdraw the record; and that the cause has not been reinstated. These facts constitute no avoidance of the plea.

It is expressly provided that no appeal shall be taken after three years. The statute commences to run from the time the final judgment is rendered, and the transcript must be filed in the office of the clerk of this court within three years from the rendition of the judgment. The judgment was rendered on the 11th day of January, 1871, and the transcript was filed in this court on the 30th day of April, 1874. This was too late. We have no jurisdiction of the case.

The appeal is dismissed, at the costs of the appellants.

MOON v. VANCUREN.

From the Kosciusko Common Pleas.

J. S. Frazer and *R. B. Encell*, for appellant.

WORDEN, J.—This was an action by Moon against Van-

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curen, upon a promissory note payable in bank, executed by Vancuren to one H. Kennedy and by the latter endorsed to the plaintiff, for three hundred and twenty dollars.

The defendant filed an answer of general denial and a paragraph, under oath, specially denying the execution of the note.

Trial by the court; finding and judgment for the defendant, a new trial being refused.

The case is before us on the evidence, upon an examination of which we are of opinion that a new trial should have been granted.

The case is very similar to that of *Nebeker v. Outsinger*, at the present term, 48 Ind. 436; and the law, as decided in that case, entitles the appellant to a new trial in this.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

BUSKIRK, C. J.—In my opinion, the facts in this case do not bring it within the principle announced in *Nebeker v. Outsinger*.

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From the Putnam Circuit Court.

J. J. Smiley and *W. G. Neff*, for appellant.

C. A. Buskirk, Attorney General, for the State.

DOWNEY, J.—This was an indictment against the appellant, for selling intoxicating liquor without a permit, under the act of February 27th, 1873, Acts 1873, p. 151.

The only question made is, that the place where the sale was made is not sufficiently averred. It is alleged that the sale was made in Putnam county, and that the liquor was sold

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to be drunk on the premises where sold, and that it was there drunk. It is claimed that if the sale was made in a room, that fact should have been stated, or, if made in a building or on premises adjoining to or connected with the place where appellant sold liquors, it should have been so averred; but to say that the liquor was sold to be drunk on the premises where sold, is not sufficient.

We are of the opinion, that the indictment is sufficiently certain and particular with reference to the place where the liquor was sold.

The judgment is affirmed, with costs.

HURNEY v. THE STATE.

CRIMINAL LAW.—*Liquor Law of 1873.*—*Instruction.*—*Limitation.*—In a prosecution for selling intoxicating liquor in violation of the act of February 27th, 1873, the court instructed the jury that if the sale was made “within two years prior to April 24th, 1874,” they should convict.

Held, that the instruction was erroneous.

From the Elkhart Circuit Court.

R. M. Johnson and J. D. Osborn, for appellant.

C. A. Buskirk, Attorney General, *W. C. Glasgow*, Prosecuting Attorney, and *J. A. Simmons*, for the State.

PETTIT, J.—This was a prosecution for selling intoxicating liquor to a minor, under the act of the 27th of February, 1873, Acts 1873, p. 151. The information charges that the sale was on the 1st day of April, 1874. The court charged the jury, among other things, that if the sale was made “within two years prior to April 24th, 1874,” the jury should convict. This instruction was clearly erroneous. The act under which this prosecution was had took effect February 27th, 1873, and had not been in force two years prior to April 24th, 1874;

• *Millard v. The President, etc., Bank of Kentucky.*

and all laws on the subject prior to that date had been repealed by it. The instruction, therefore, tells the jury that, though the sale was made at a time when there was no law on the subject, they should find the defendant guilty.

The judgment is reversed, with instructions to grant the defendant a new trial.

Petition for a rehearing overruled.

**MONTGOMERY, TREASURER, ET AL. v. THE JEFFERSONVILLE,
MADISON, AND INDIANAPOLIS RAILROAD CO.**

From the Scott Circuit Court.

S. S. Crowe and *C. L. Jewett*, for appellants.

C. E. Walker and *W. S. Roberts*, for appellee.

BUSKIRK, C. J.—This case is, in substance and legal effect, the same as that of *The Jeffersonville, Madison, and Indianapolis R. R. Co. v. McQueen*; decided at the present term, *ante*, p. 64. In that case, the injunction was refused, and we affirmed such ruling. In this case the injunction was granted, and consequently the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions for further proceedings in accordance with the opinion in the principal case upon which the ruling in this case is based.

**MILLARD v. THE PRESIDENT, DIRECTORS, AND COMPANY OF
THE BANK OF KENTUCKY.**

From the Floyd Circuit Court.

G. V. Hawk and *W. W. Tuley*, for appellant.

The State, *ex rel.* Schmaltz, *v.* Kiefel.

J. H. Stotsenburg, for appellee.

PETTIT, J.—Suit by appellee against appellant, on a promissory note. Answer, general and special, of no consideration. Trial by the court, finding for the appellee, and, over a motion for a new trial, judgment on the finding

The only question in the case is as to the sufficiency of the evidence to sustain the finding.

The judge, who tried the case, delivered a long opinion reviewing the evidence, and, after examining the evidence closely, we think the judge could not legally have come to a different conclusion from the one reached.

We are of the opinion, from the evidence, that this case was brought here for delay merely, and not to correct any error of the court below or with any reasonable expectation that the judgment would be reversed.

The judgment is affirmed, at the costs of the appellant, with five per cent. damages.

THE STATE, EX REL. SCHMALTZ, *v.* KIEFEL.

SURETY OF THE PEACE.—*Practice.—Judgment.*—In a proceeding for surety of the peace, the parties agreed, in the circuit court, that the cause should be dismissed, at the costs of the defendant, without any trial of the issue or finding or verdict thereon.

Held, that the court could not order the defendant to stand committed until the costs should be paid or replevied.

From the Dearborn Circuit Court.

G. R. Brumblay and *J. Schwartz*, for appellant.

DOWNEY, J.—Schmaltz instituted a proceeding in the name of the State, on his relation, against Kiefel, for surety of the peace, before the mayor of Lawrenceburgh. The defendant was arrested and brought before the mayor, where, “having

The State, *ex rel.* Schmaltz, v. Kiefel.

waived his right to an examination," he was required by the mayor to enter into a recognizance for his appearance at the next term of the circuit court, and that, in the meantime, he would keep the peace, which recognizance he accordingly gave. At the next term of the circuit court, the parties appeared, and it was agreed between them "that the said cause be no further prosecuted, but be dismissed at the costs of the defendant." Thereupon the prosecuting attorney and the relator moved the court to render judgment in the cause, that the defendant pay the costs accrued in the cause, and that he stand committed until the same be paid or replevied. This motion the court overruled, and the movers excepted. The court then rendered an ordinary judgment that the relator recover of the defendant his costs expended, to which the prosecuting attorney and the relator again excepted. The point as to the correctness of these rulings having been reserved, they are here assigned as error.

Counsel for appellant refer us to 2 G. & H. 642, sec. 26, in support of their position. The section is as follows: "Such cause shall be docketed and tried," etc., "under the rules governing such trials before justices; and, if the finding of the court, or the verdict of the jury, be against the defendant on the issue, such court shall require of such defendant recognizance and surety that he will keep the peace for such length of time as the court may direct, and shall also give judgment against him for costs, and that he stand committed until the same be paid or replevied."

According to this section, there must be a finding of the court or a verdict of a jury "against the defendant on the issue;" that is, "whether the complaining witness had just cause to entertain the fears expressed in his affidavit," in the language of section 23, on p. 641, before the court can compel him to enter into the recognizance, give judgment against him for costs, and order him to stand committed until the same be paid or replevied.

The fact that the parties agreed that the cause be no further

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prosecuted was not equivalent to a finding or verdict against the defendant "on the issue."

Counsel for appellant also refer us to *The State v. Sayer*, 35 Ind. 379, in aid of their views. But we think it clear, that the case is not an authority upon the point in question. The parties having agreed that the cause should be dismissed, at the costs of the defendant, without any trial of, or finding or verdict upon, the issue, we think the court was right in refusing to order the defendant to stand committed until the costs should be paid or replevied.

The judgment is affirmed, with costs against the relator.

THE PITTSBURGH, CINCINNATI, AND ST. LOUIS RAILWAY
Co. v. HAYS ET AL.

PLEADING.—Contract.—Common Carrier.—In a complaint against a railroad company for a breach of a contract to furnish, at a certain time and place, the necessary cars, and to transport a certain number of hogs, it is not necessary to allege that the defendant, at the time complained of, had the ability to transport or to furnish the means to transport said hogs.

From the Grant Circuit Court.

N. O. Ross, for appellant.

BUSKIRK, C. J.—This was an action by the appellees against the appellant, as a common carrier, to recover damages for a breach of its contract to transport certain live hogs of appellees.

Issue, trial by jury, verdict for appellees, motion for a new trial overruled, and judgment on the verdict.

The appellant has assigned for error, that the complaint does not contain facts sufficient to constitute a cause of action, and that the court erred in overruling a motion for a new trial.

The objection urged to the complaint is, that it is not averred that the appellant, at the times complained of, had the

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ability to transport, or to furnish the means to transport, the plaintiffs' hogs.

The complaint was in three paragraphs. In the first, it is averred that the plaintiffs, on or about the 20th of October, 1872, informed the agent of appellant, at Marion, Indiana, that they would have five hundred head of hogs to ship from said point over its road, and that said agent then agreed to have the necessary cars ready at such point on the 28th day of November, 1872; that in pursuance of said contract, the plaintiffs, on the 28th of November, 1872, placed five hundred head of hogs in the appellant's pens at said point, ready to be shipped, and then notified the said agent that said hogs were ready for shipment, and requested said agent to furnish the necessary cars to transport said hogs to the city of Pittsburgh, Pennsylvania; that the appellant unreasonably failed and refused, for the space of one month, to transport the said hogs; and that, by reason of such delay, the plaintiffs were damaged in the sum of five hundred dollars, in the expense of feeding and taking care of said hogs; in the further sum of five hundred dollars in the falling off in weight of said hogs; and in the further sum of five hundred dollars in the depreciation in value of said hogs at Pittsburgh, the place to which they were to be shipped.

The second paragraph of the complaint is the same as the first, except it is alleged that the plaintiffs, on the 28th day of November, 1872, at the instance and request of the defendant, delivered and placed in the pens, at Marion, so belonging to said defendant, to be shipped on said defendant's road by said defendant, two thousand fat hogs, etc.

The third paragraph is the same as the first, except the hogs were delivered at Upland, instead of Marion.

We think the complaint is good. Each paragraph of the complaint alleges a contract to furnish the necessary cars to transport the hogs. In such case, it is not necessary to aver ability to furnish transportation. The appellant having agreed to furnish the cars was bound to do so or compensate in damages for the failure.

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The motion for a new trial was overruled, and judgment rendered on the 14th day of February, 1874, and sixty days time was granted to prepare and file the bill of exceptions. The clerk has copied into the transcript a bill of exceptions, but it does not appear to have ever been filed in the clerk's office, nor was the transcript certified within sixty days from the rendition of the judgment. Under these facts, the bill of exceptions cannot be regarded as constituting a part of the record, and hence no question is presented as to the action of the court in overruling the motion for a new trial.

The judgment is affirmed, with costs.

EHRGOTT ET AL. v. MCPHETERS.

From the Monroe Circuit Court.

E. K. Millen, C. W. Henderson, and J. H. Loudon, for appellants.

J. W. Buskirk and L. L. Norton, for appellee.

PETTIT, J.—This suit was brought by the appellants against the appellee, on an account for seventy dollars and seventy-five cents, before a justice of the peace. There was a trial by the justice and judgment for the defendant, appellee here, for costs. Appeal to the circuit court, and a trial by the court and judgment for the defendant, appellee here.

There was a motion for a new trial, and the overruling of this motion is the only error assigned. The counsel on both sides have furnished us with long and able printed briefs, but the only question in the case, after all, is as to the sufficiency and preponderance of the evidence.

Two courts having heard the evidence and found for the appellee, there being a conflict of evidence, under many and

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an unbroken line of decisions of this court, we cannot reverse, but must affirm, the judgment of the court below.

The judgment is affirmed, at the costs of the appellants.

KING v. THE STATE.

From the Marion Criminal Court.

F. J. Mattler, for appellant.

C. A. Buskirk, Attorney General, for the State.

DOWNEY, J.—The appellant was indicted, tried, and convicted of conspiracy with others to commit a felony. The case is before us on the question as to the sufficiency of the indictment. In the description of the crime, the indictment is like that in the case of *Landringham v. The State*, ante, p. 186, which was held bad, because it did not, with sufficient fulness and accuracy, describe the felony which the conspirators intended to commit. On the authority of that case, the indictment in this case must be held insufficient.

The judgment is reversed, and the cause remanded, with instructions to quash the indictment; and the clerk will certify the warden of the state prison as required by law.

WERNEKE v. THE STATE.

From the Putnam Circuit Court.

J. J. Smiley and *W. G. Neff*, for appellant.

C. A. Buskirk, Attorney General, for the State.

The Pittsburgh, etc., R. W. Co. v. Keller.

BUSKIRK, C. J.—The appellant was convicted in the court below, for a violation of the sixth section of the act of the 27th of February, 1873.

The appellant moved to quash the affidavit and information, but his motion was overruled, and he took an exception, and this ruling is assigned for error and presents the sole question in the case. The objection urged to the information is, that it is not averred that the liquor was sold with knowledge on the part of the appellant that the purchaser was in the habit of getting intoxicated. The objection is untenable. It was held in *Farrell v. The State*, 45 Ind. 371, that the State was not required to prove that the vendor knew that the purchaser was in the habit of getting intoxicated. It is a matter of defence, and need not be averred.

The judgment is affirmed, with costs.

THE PITTSBURGH, CINCINNATI, AND ST. LOUIS RAILWAY CO.
v. KELLER.

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RAILROAD.—*Killing Animal.—Pleading.—Fence.*—In a complaint, under the statute, against a railroad company for the value of hogs killed by a passing train, it is not sufficient to allege, in regard to the fence, "that said railroad was not, at the time and place where said animals were killed, fenced in by said defendant in manner and form as in the statute provided."

From the Madison Circuit Court.

N. O. Ross and H. D. Thompson, for appellant.

R. Lake and — Kilgore, for appellee.

WORDEN, J.—This was an action by the appellee against the appellant, to recover the value of certain hogs, alleged to have been killed by the appellant's locomotive and cars, upon

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her road at a point where it was not fenced. Issue, trial by the court, finding and judgment for the plaintiff.

The defendant below moved in arrest of judgment, but the motion was overruled, and exception taken. This ruling is assigned for error. It is also assigned for error that the complaint does not state facts sufficient to constitute a cause of action.

The objection to the complaint has reference to the allegation in respect to the fencing of the road. The following is the allegation :

“That said railroad was not, at the time and place where said hogs were killed, fenced in by said defendant in manner and form as in the statute provided.”

In the case of *The Indianapolis, etc., R. R. Co. v. Bishop*, 29 Ind. 202, it was held that substantially such an allegation was insufficient, as averring a legal conclusion and not a fact. The allegation is not that the road was not securely fenced, but that it was not fenced in “in manner and form as in the statute provided.” The case cannot be distinguished from that in 29 Ind. The last named case was followed in the cases of *The Indianapolis, etc., R. R. Co. v. Robinson*, 35 Ind. 380, and *The Jeffersonville, etc., R. R. Co. v. Underhill*, 40 Ind. 229. See, also, *The Pittsburgh, etc., R. R. Co. v. Brown*, 44 Ind. 409. On these authorities, we must hold the complaint insufficient.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to sustain the motion in arrest of judgment.

SCHULZ v. KLENK.

PRINCIPAL AND SURETY.—Promissory Note.—Burden of Proof.—A promissory note signed by two persons, who are partners in business, in form as makers, was indorsed by a third person, not a member of said firm, at the

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request of one of said makers, in the absence of the other, with whom said indorser had no communication on the subject, it not appearing that said absent maker had any knowledge of said indorsement, and said indorser believing that both of said partners were makers, and intending himself, in placing his name on the back of the note, to become their indorser.

Held, that, as between said absent maker and said third person, the presumption from the form of the note was, that the former was a maker and the latter an indorser, and the burden of proof was on the former to show that he was a co-surety with the latter.

Held, also, that the facts shown did not establish a different relation between the parties from that to be presumed from the form of the note.

From the Vanderburgh Circuit Court.

P. Maier, for appellant.

V. Bisch, for appellee.

BUSKIRK, C. J.—This action was brought by the First National Bank of the City of Evansville, against Charles F. C. Schmidt, George Klenk, and Theodore Schulz, on a note executed by Schmidt & Klenk, as makers, and endorsed by Schulz in the usual way.

Schmidt was not found, and nothing further was done as to him. Schulz, the appellant, answered that he was only the surety of Schmidt & Klenk on the note, and asked that the property of his co-defendants be first exhausted.

The appellee, Klenk, thereupon also filed what he calls an answer and cross complaint, alleging that Schulz and himself were co-sureties for Schmidt, and liable to contribute alike to the payment of the note.

The controversy being entirely between Schulz and Klenk, the bank took judgment against both parties for the face of the note, attorneys' fees, and costs, leaving the question between the defendants open for litigation.

While the issues were pending between these parties, the court of common pleas was abolished, and the cause came into the circuit court, in which the issues were, by agreement of the parties, tried by the court, who found against appellant, and judgment was rendered that each pay one-half of the judgment in favor of the bank, and the costs in the same proportion, to which finding and judgment appellant excepted.

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Motion for a new trial, written causes filed, motion overruled, and exception ; prayer for appeal, and thirty days time given in which to file bill of exceptions.

The written causes are as follows :

1. The finding of the court is contrary to law.
2. The finding of the court is not sustained by sufficient evidence.

The error assigned is in overruling the motion for a new trial. The evidence is properly in the record, and the sole question is whether the finding is sustained by the evidence.

The only witnesses were the appellant and appellee. The appellee was first examined, and testified as follows : " The defendant, Charles Schmidt, asked me to sign the note sued on in this action as his surety ; he had signed the note himself when I signed it ; I got no part of the proceeds of the note, but the whole went to Schmidt ; I signed the note as his surety."

Upon cross-examination, he testified : " At the time the note was made, Schmidt, myself, and Oscar Schulz were co-partners in the perfumery business ; the money drawn out of the bank was not used for the benefit of the firm, but for Schmidt only." And this was all the evidence offered by the appellee.

Schulz, the appellant, offered himself as a witness in his own behalf, and testified as follows : " One day, when I came to the business place of Charles Schmidt, Oscar Schulz, and George Klenk, Schmidt handed me the note sued on in this action, and wanted my name on it ; it was already signed by Schmidt and Klenk as makers ; I then indorsed the note, believing that by so doing I was the surety of the other parties on the note ; I never intended to become the co-surety with Klenk for Schmidt ; I indorsed the note because I always understood that an indorser on the note was not liable till the others were exhausted ; had no connection with the firm of Schmidt, Schulz & Klenk ; had no conversation with Klenk about the note, only saw his name on it when I made the indorsement ; would not have signed the note as surety of Schmidt ; I indorsed it

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believing I was the surety of the two ; I don't know what became of the money received on the note ; think, however, it went into the firm."

Cross-examination : " The money might have been used as Schmidt's part or share in the firm ; I never got any of it."

This closed the evidence, and upon it the court found that appellant and appellee were co-sureties of Schmidt, and rendered judgment accordingly.

Schmidt and Klenk appear upon the face of the note as makers and primarily liable, while Schulz appears as an indorser and secondarily liable. The form of the instrument and the manner in which the names appear are not conclusive as to their relations with each other ; but the actual relations may be shown to be other than they appear upon the face of the contract ; and as between appellant and appellee their rights will depend upon the actual facts. The presumption is, that Klenk was a maker. The burden was upon him to show that he was a co-surety with appellant, and not a joint maker with Schmidt. We think the evidence fails to show that the appellee was a surety. He and Schmidt were partners in business. They signed the note first as makers. The appellant afterward endorsed the note, as he testifies, as surety of both the makers. Klenk was not present when the note was indorsed by appellant, nor was there any conversation, understanding, or contract between appellant and appellee. It does not even appear that appellee knew that appellant indorsed the note. The relation between appellant and appellee is a matter of contract. None was shown to exist. The appellee wholly failed to show that he occupied any different position than the law assigns him. *Lacy v. Lofton*, 26 Ind. 324 ; *Bowser v. Rendell*, 31 Ind. 128 ; *Houston v. Bruner*, 39 Ind. 376 ; *Core v. Wilson*, 40 Ind. 204 ; *Alley v. Gavin*, 40 Ind. 446 ; *Schooley v. Fletcher*, 45 Ind. 86.

The judgment is reversed, with costs ; and the cause is remanded for another trial, in accordance with this opinion.

Vandivere et al. v. Dollins et al.

VANDIVERE ET AL. v. DOLLINS ET AL.

EVIDENCE.—Hearsay.—Husband and Wife.—Where the question was as to whether a certain sum of money delivered by a person to his son-in-law, for which the latter gave his note to the former, was a loan to said son-in-law or an advancement to his wife, a daughter of the payee of the note, since deceased, a witness was allowed, over objection, to testify that, after the making of the note and receipt of the money by said son-in-law, the latter told the witness that when he got the money he took it right home and handed it to his wife and said, "there is your money." *Held*, that his evidence was hearsay, and not admissible as the declaration of an agent, and that the judgment could not, in disregard of the error in its admission, be affirmed on other evidence.

From the Johnson Circuit Court.

S. P. Oyler, for appellants.

G. M. Overstreet and *A. B. Hunter*, for appellees.

DOWNEY, J.—This is a question arising in the distribution of the personal estate of Willis Dollins, deceased, among his heirs. In his lifetime the deceased had sold some land, and let two of his adult children and two of his sons-in-law each have six hundred dollars of the money, taking from each of them a promissory note for the amount, payable twelve months after date, with interest. One of these notes was executed by Peter Vandivere, one of the sons-in-law of the deceased.

The question in this case is whether the amount for which this note was given was an advancement to Malinda Vandivere, the wife of Peter Vandivere, and a daughter of the deceased, and whether the same should be deducted from the share of the estate as against her heirs in this case, she being dead.

There is evidence in the bill of exceptions tending to show that the amount was intended by the deceased as an advancement to the daughter, and other evidence in addition to the note tending to show that it was a loan to the son-in-law Vandivere.

On the trial of the cause, Winford Dollins, a witness for appellees, over the objection of the appellants, was permitted

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to testify that sometime after the making of the note and receipt by him of the money, Peter Vandivere told her that when he got the money he took it right home and handed it to his wife and said, "there is your money." The objection to the evidence was, that it was hearsay, and not a statement or admission of any party to the suit.

We think the objection should have been sustained. Counsel for appellees submit that the declaration of Peter was admissible, on the ground that he was acting as the agent of his wife. We think not. It was not made in connection with any act of his as agent, but was by way of recital as to what had been previously done. *The Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335.

This case also decides another point in the case, made by the appellees, against them ; that is, that we can disregard this error and affirm the judgment on the other evidence.

The judgment is reversed, with costs, and the cause remanded for a new trial.

THE PITTSBURGH, CINCINNATI, AND ST. LOUIS RAILWAY
Co. v. KELLER.

From the Madison Circuit Court.

N. O. Ross and *H. D. Thompson*, for appellant.

Lake & Kilgore, for appellee.

BUSKIRK, C. J.—The complaint in this case is the same as in the case of *The Pittsburgh, etc., R. W. Co. v. Keller*, *ante*, p. 211, and our ruling must be the same.

The judgment is reversed, with costs; and the cause is remanded, with the same directions as in said case.

Vogel v. The Lawrenceburgh, etc., Co.

VOGEL v. THE LAWRENCEBURGH TOBACCO MANUFACTURING Co.

JUSTICE OF THE PEACE.—*New Trial.*—A new trial cannot be granted by a justice of the peace, on account of newly-discovered evidence, after the expiration of four days from the entering of judgment. Sec. 356, 2 G. & H. 215, is not applicable to courts of justices of the peace.

From the Dearborn Common Pleas.

J. Schwartz, for appellant.

N. S. Givan and ——— *Mathews*, for appellee.

DOWNEY, J.—The appellee, on the 25th day of February, 1871, recovered a judgment against the appellant, before a justice of the peace. On the 31st day of July, 1871, the appellant filed before the justice a verified motion or complaint for a new trial in the cause, on account of newly-discovered evidence. A demurrer to the complaint or motion was filed by the appellee, and sustained by the justice, and judgment was rendered for the defendant. Vogel appealed to the common pleas, where the demurrer to the motion or complaint, which had been filed before the justice, was again sustained, and judgment rendered for the defendant. The sustaining of the demurrer is the error assigned.

New trials before a justice of the peace, according to 2 G. & H. 592, sec. 56, must be granted within four days after entering judgment.

Judgments by default may be set aside at any time within ten days. 2 G. & H. 593, sec. 62.

An appeal may be taken within thirty days. 2 G. & H. 593, sec. 64.

Under certain circumstances, an appeal may be ordered by the appellate court after thirty days. 2 G. & H. 597, sec. 68.

The judgment defendant has not sought relief in this case in any of these modes, but has filed a complaint for a new trial after the lapse of more than five months.

Counsel for appellant concedes that his position is novel, but contends that that is no sufficient reason why it cannot be main-

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tained. The argument is this: Sec. 75, 2 G. & H. 600, is as follows: "In all cases not in this act specially otherwise provided, proceedings before justices shall be governed by the practice and usages of circuit courts, and the rules of the common law so far as the same are in force in this State."

The statute in relation to new trials in the circuit court, 2 G. & H. 211, sec. 352, provides that "a new trial may be granted in the following cases, and upon the following terms: * * Seventh. Newly-discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial."

Sec. 356, 2 G. & H. 215: "Where causes for new trial are discovered, after the term at which the verdict or decision was rendered, the application may be made by a complaint filed with the clerk, not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term. The application shall stand for hearing at the term to which the summons is returned executed, and shall be summarily decided by the court, upon the evidence produced by the parties. But no such application shall be made more than one year after the final judgment was rendered."

Is this section applicable to the court of a justice of the peace? It is conceded that there is no authority directly in point. Sec. 75, above quoted, has reference to "cases not in this act specially otherwise provided." As we have seen, there is a section in the justices' act which provides otherwise, by enacting that new trials may be granted within four days after judgment, and which must be construed as impliedly forbidding the granting of the same after that time. *Foist v. Coppin*, 35 Ind. 471, has some bearing on the question, although not directly in point.

We have given the question due consideration, and have arrived at the conclusion that the ruling of the common pleas, in sustaining the demurrer, was correct. We have not considered it necessary to decide upon the sufficiency of the facts

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alleged in the complaint to warrant the granting of a new trial, supposing the other question out of the way.

The judgment is affirmed, with costs.

SHATTO ET AL. v. SHELDEN, EX'R.

From the Kosciusko Circuit Court.

H. S. Biggs and *E. V. Long*, for appellants.

J. S. Frazer and *R. B. Encell*, for appellee.

BUSKIRK, C. J.—The appellee, as executor of the estate of Elisha Sheldon, deceased, submitted his final report, in which he claimed a credit for three thousand two hundred and fifty-eight dollars, for boarding and taking care of his mother, under the provisions of the will of said decedent. The appellants were, upon their application, made defendants, and moved to reject and strike out the report and accompanying exhibits, but the motion was overruled. They then filed exceptions to the confirmation of the report, which were stricken out on motion of the appellee. The cause being called for trial, the appellants demanded a trial by jury, which was overruled by the court. The cause was then tried by the court, who rendered a finding, in favor of appellee, for the sum of one thousand seven hundred and forty-two dollars and five cents. The court overruled a motion for a new trial.

The appellants have assigned for error the overruling of the motion for a new trial. The appellee has filed in this court a confession of error, that the court erred in refusing the appellants a trial by jury. The judgment must, therefore, be reversed for such error.

We have looked into the record and find that there is no other question discussed by counsel for appellants that we can decide. The evidence is not in the record, and, hence, we can

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not determine as to the sufficiency of the evidence to support the finding. The principal and most important question in the case is whether the appellee is still the executor of such estate. It appears that on the 27th day of January, 1865, he submitted his final report, and was discharged, and that afterward, on the 18th day of September, 1871, the appellee filed his application, supported by affidavit, to have said settlement set aside, which motion was sustained, and the court entered of record an order setting aside said settlement and restoring the said appellee as executor; but the application and affidavit are not in the record, and, consequently, we are unable to determine for what cause such order was made, and we decide nothing in reference thereto.

The judgment is reversed, with costs, upon such confession of error; and the cause is remanded for a new trial.

BROWNLEE v. SWITZER, GUARDIAN.

INSANE PERSON.—Guardian.—Attorney's Fees.—Under the fifth section of the act of May 29th, 1852, 2 G. & II. 573, relating to insane persons and the appointment of guardians, etc., the guardian of an insane person may be required to pay an attorney, employed by the children of such insane person to prosecute the proceeding in which such person was adjudged insane and said guardian was appointed, for services rendered under such employment.

From the Grant Circuit Court.

J. Brownlee, for appellant.

A. Steele and *R. T. St. John*, for appellee.

BUSKIRK, C. J.—This was an action by appellant against the appellee, as guardian of an insane person, for services rendered in the proceedings which resulted in such person being adjudged insane and in the appointment of a guardian to man-

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age her estate. The appellant was employed by the children of such insane person to prosecute such proceeding. After a long investigation, such person was adjudged incapable of managing her property, and the appellee was appointed her guardian. It appears of record that such person has an estate of six or seven thousand dollars. The services of the appellant and their value are admitted, and the sole question made by counsel for appellee is, whether the estate of such person is liable to pay the appellant for his services.

The proceedings were had under the act of May 29th, 1852, 2 G. & H. 573, relating to insane persons and the appointment of guardians for such persons, etc. The fifth section of said act reads :

“Whenever a guardian shall be appointed for any person of unsound mind, he shall pay the expenses of such trial, but if the jury find that such person is not of unsound mind, then the court shall give judgment against the person making the complaint for the costs.”

We think that the above section not only authorized, but required, the payment of the appellant, for the reasonable value of his services, out of the estate of the person for whom the guardian was appointed. It is expressly provided, that “whenever a guardian shall be appointed for any person of unsound mind, he shall pay the expenses of such trial.” The word “expenses” embraces costs of officers and fees of witnesses and jurors, and reasonable attorneys’ fees; for it is obvious that an inquisition of insanity could not be correctly and legally instituted and carried through without the services of an attorney, and as the object of the inquisition is to protect the property of insane persons, the legislature has wisely provided that the expenses of such trial shall be paid by the guardian, when one is appointed. On the other hand, it is provided that if the jury find that such person is not of unsound mind, then the court shall give judgment against the person making the complaint, for the costs. The first branch of the section encourages persons to institute such proceedings where there are reasonable grounds therefor, while the last clause discourages the

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institution of such proceedings without probable cause. In the last case, the penalty imposed is the payment of the costs.

We think the words "expenses" and "costs" were advisedly used, and were intended to convey different meanings. Unless a guardian is appointed, the court would have no jurisdiction over the estate of such person, and could make no order in reference thereto. If, however, the finding was the other way, the legislature had the right to authorize the court to adjudge the costs against the person making the complaint, but prudently left such person to settle with his attorney.

The judgment is reversed, with costs; and the cause is remanded, with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings, in accordance with this opinion.

THE WESTERN UNION TELEGRAPH COMPANY v. HOPKINS.

PLEADING.—*Demurrer to Complaint does not go to Damages.*—*Damages.*—In an action for the breach of a contract by defendant, whereby, it is alleged, plaintiff suffered damages in the loss of advantage he otherwise would have realized from other contracts made by him, a demurrer to the complaint, wherein the contract between plaintiff and defendant and the breach thereof by defendant are averred does not raise the question of the liability of defendant for consequential damages, by reason of the loss of such advantage suffered by plaintiff. The contract with defendant and its breach by him being alleged, the amount of damages is not to be decided by demurrer.

SAME.—*Copy of Written Instrument.*—*Demurrer.*—*Statute of Frauds.*—Under the code, in an action upon a contract which is not alleged to be in writing, and the original or a copy of which is not filed with the complaint, the presumption is, that the contract is not in writing; and if the contract is such as is, by the statute, required to be in writing, the objection may be taken by demurrer.

SAME.—*Contract.*—*Action On.*—*Telegraph Despatch.*—*Evidence.*—In an action against a telegraph company for failure to transmit a despatch, by reason of which the plaintiff lost the advantage of certain contracts made by him

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with other parties, the action is not founded on such contracts, but on the contract of the company to send and deliver the despatch; therefore said contracts with other parties may be proved, under the allegations of the complaint, to have been in writing.

PRACTICE.—*Excessive Damages.*—*Motion for New Trial.*—That the damages assessed by the court upon the trial were excessive, cannot be presented for the consideration of the Supreme Court, except by making it a reason for a new trial in the court below.

EVIDENCE.—*Telegraph Despatch.*—*Secondary Evidence.*—In an action against a telegraph company for damages for failure to transmit a despatch, the original despatch delivered to the operator must be given in evidence, or if not its absence must be properly accounted for before secondary evidence thereof can be admitted.

From the Laporte Circuit Court.

W. H. Calkins, for appellant.

L. A. Cole and *J. A. Thornton*, for appellee.

DOWNEY, J.—Hopkins, the appellee, brought his action against the telegraph company, to recover damages alleged to have been sustained by him, by reason of the negligence of the appellant in failing to transmit and deliver a message entrusted to it by him for that purpose, at its office in Chicago, in the State of Illinois. The message was to have been transmitted from Chicago to Michigan City, in this State, and was as follows:

“To H. M. Hopkins: Tell Kellogg I take the brick. Home to-morrow. (Signed) J. T. HOPKINS.”

The complaint was in two paragraphs, to each of which a demurrer was overruled, whereupon the appellant filed an answer of general denial.

There was a trial by the court, which resulted in a finding for the appellee, his damages being assessed at two hundred and fourteen dollars and twenty cents, and a judgment in his favor for that amount, the motion of the appellant for a new trial having been overruled. The proper exceptions were reserved at each stage of the case, and the evidence is in the record by a bill of exceptions.

There are but two errors assigned, viz.:

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1. Overruling the demurrers to the several paragraphs of the complaint.

2. Overruling the motion of the appellant for a new trial.

We will consider these in their order; and, first, were the demurrers correctly overruled?

The case made by the first paragraph of the complaint is this: Hopkins, the appellee, had entered into a contract with one Kellogg, at Michigan City, Indiana, for the purchase, by the former from the latter, of the brick in a certain kiln, estimated at one hundred and fifty thousand, more or less, at an agreed price of ten dollars per thousand, Kellogg agreeing to hold the brick for Hopkins till the close of a certain day, during which time it was to be optional with Hopkins whether he would take them or not; that Hopkins on that day went to Chicago and made a contract for the sale of the same brick to certain parties there at an advanced price; that thereupon, at about three o'clock in the afternoon, he went to the office of the appellant in Chicago, and delivered to its operator there the message hereinbefore referred to for transmission to his brother and agent at Michigan City, and paid the charges for its transmission; that appellant, by reason of the negligence and carelessness of its servants, failed to transmit and deliver said message until noon of the next day; that in consequence of such failure Kellogg sold the brick to other parties, though he could and would have delivered them to the appellee, had said message been delivered at the proper time; that, by reason of said negligence and failure, the appellee was deprived of the advantage he would otherwise have realized from his contracts, and was thereby damaged five hundred dollars.

The second paragraph differs from the first only in treating the arrangement between the appellee and Kellogg as a proposition by the latter to sell the brick to the former, and that the message alluded to was the acceptance of that proposition, attempted to be communicated to Kellogg through the instrumentality of the appellant.

Counsel for the appellant says: "Our first objection to

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each count of the complaint is, that it does not allege that the appellee was compelled to or became liable to pay any damages, or was otherwise injured in the alleged failure of the appellant to deliver the message, except in the loss of speculative gains and profits, which, under certain contingencies, he might have made. This the law does not allow."

We do not deem it necessary to consider this question in deciding the demurrer.

The complaint alleges the making of a contract by the defendant and the violation of it. This shows that the plaintiff has a cause of action for some amount in damages, and what that amount shall be is not a question to be decided upon a demurrer to the complaint.

The next objection urged is, "that the supposed contract alleged between the appellee and Kellogg is within the statute of frauds, and could not have been enforced by either against the other.

"No writing is filed with the complaint, nor is any writing referred to therein; this court will, therefore, presume that the contract was verbal.

"Neither is it alleged that anything was paid as earnest to bind the bargain, or that the property, or any part of it, was delivered by Kellogg to the appellee; and the amount or value of the subject of the contract largely exceeds fifty dollars, to wit, one hundred and sixty-three thousand brick at ten dollars per thousand."

We think this position untenable. At common law, where a contract required by the statute of frauds to be in writing was declared upon, it was unnecessary to allege in the declaration that it was in writing. But it has been held, under the code, where a contract in writing is declared on, the original or a copy of it must be filed with the complaint; and if it is not alleged to be in writing, and the original or a copy is not filed, the presumption arises that the contract is not in writing; and if the contract is such as is required by the statute to be in writing, the objection may be taken by demurrer. But if the contract is such as might be valid without being in writing, as a con-

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tract for the sale of goods, where there is part payment, etc., the objection cannot be raised by demurrer. *Harper v. Miller*, 27 Ind. 277.

The action in the case under consideration is not on the contract for the sale of the brick, but is on the contract to send and deliver the despatch. The contract with reference to the sale of the brick may be proved, under the allegations of the complaint, to have been in writing, if that is necessary, although that fact is not alleged. Hence, this objection to the complaint must be disallowed.

The following are the grounds for a new trial urged in the circuit court:

1. The finding of the court is contrary to the evidence.
2. It is contrary to law.
3. The court erred in admitting the paper to be read in evidence, purporting to be a message to one H. M. Hopkins, it being the only one introduced in evidence, over the objection of the defendant, etc.

Counsel for appellant discusses, at considerable length, the question as to the amount of damages awarded by the court. As the finding of the court was not questioned on this ground by the motion for a new trial, we cannot consider the question.

The last reason for a new trial should have prevailed. The original telegram or despatch should have been used as evidence, or its absence properly accounted for, before secondary evidence was allowed. *Durkee v. The Vermont Central R. R. Co.*, 29 Vt. 127; *Williams v. Brickell*, 37 Miss. 682; *Matteson v. Noyes*, 25 Ill. 591.

In the first named case, the question is discussed as to what is the original. In the case under consideration, however, there is no doubt but that the despatch delivered to the operator was the original.

The judgment is reversed, with costs, and the cause remanded for a new trial.

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SANDERS ET AL. v. THE STATE, EX REL. BUCHER ET UX.

From the Green Circuit Court.

W. J. Baker and *L. Shaw*, for appellants.

A. G. Cavins and *E. H. C. Cavins*, for appellees.

WORDEN, J.—This was an action by the appellee against the appellants, upon the bond of Sanders as the guardian of Mary S. Milam and Abraham L. Milam, who were minor heirs of John W. Milam, deceased, the said Mary having intermarried with said Andrew M. Bucher. The bond is in the ordinary form of a guardian's bond, and the breaches assigned are :

1. That the guardian has converted to his own use the money, credits, and assets of said relator.

2. That he has failed to render an account of his proceedings whenever required by law.

3. That he has failed to settle with and account to the relator Andrew M. Bucher, husband of said Mary S.

4. That said guardian has failed to rent the lands of said ward to the best advantage, and failed to account for the rents due to said ward.

Issue, trial by the court, finding and judgment for the plaintiff for the sum of one thousand nine hundred and forty-eight dollars and ninety-two cents, a new trial being asked for by the defendants, and denied. Exception.

One of the grounds upon which a new trial was asked was, that the damages assessed by the court were excessive.

Error is assigned upon the overruling of the motion for a new trial.

The evidence is before us. It appears that the executor of John W. Milam had lent some money belonging to the estate to Peter S. Nance and Josiah Tongate, and had taken a note and mortgage from Nance. This claim came into the hands of Sanders, as guardian of the two children. At the time this suit was brought, there was near three hundred dollars remaining due and uncollected on this claim, which had been reduced

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to judgment. The guardian also held a note, payable to himself, as the guardian of the heirs of John W. Milam, signed by John T. Owen and Bennett Stalcup, for two hundred and seven dollars. This note seems to have been unpaid. These two items must have been charged wholly against the guardian, in order to make up the amount found against him. The half of each one of these two items would seem to have belonged to each of the wards. The guardian could not be sued by the relator for the half belonging to her until he had collected it, unless there was an allegation of negligence, or some other allegation that would make him responsible for it. There is no such allegation in the complaint.

We are of opinion, therefore, that the motion for a new trial, on the ground of excessive damages, was well taken and should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

LAYTON v. THE STATE.

LIQUOR LAW OF 1873.—Affidavit.—In a prosecution, under the tenth section of the liquor law of 1873, for a sale of liquor after nine o'clock in the evening, it is necessary to allege that the liquor was sold to be drank on the premises where it was sold.

From the Putnam Circuit Court.

J. J. Smiley and *W. G. Neff*, for appellant.

C. A. Buskirk, Attorney General, *R. D. Doyle*, *W. R. Guthrie*, Prosecuting Attorney, and *T. C. Grooms*, for the State.

DOWNEY, J.—This was a prosecution on affidavit and information, against the appellant, under the tenth section of the liquor law of February 27th, 1873, Acts 1873, p. 151.

Montgomery *et al.* v. Gorrell *et al.*

The affidavit charges a sale made after nine o'clock in the evening, but it does not allege that the liquor was sold to be drunk on the premises where it was sold. A motion to quash the affidavit and information was made and overruled in the circuit court. According to the opinion of a majority of the court in *Morris v. The State*, 47 Ind. 503, the motion should have been sustained.

The judgment is reversed, and the cause remanded, with instructions to quash the affidavit and information.

MONTGOMERY ET AL. v. GORRELL ET AL.

49 230
159 279

PRACTICE.—*Supreme Court.*—*Alteration of Transcript.*—Where, on appeal to the Supreme Court, alterations have been made in a bill of exceptions and the transcript of the record, by counsel for the appellant, before they were signed, without any wrongful purpose, the appeal will not, because of such alterations, be dismissed, but the parties will be left to the usual methods of correcting the record.

SAME.—*Instrument Lost or Taken from Files.*—Where a written instrument which should constitute part of the record cannot be found, so as to be copied into a transcript for appeal to the Supreme Court, a supposed duplicate thereof should not be substituted without the consent of the appellee or his attorney, but proper proceedings should be instituted to compel the production of the original, or to prove its contents and thus make it a part of the record.

From the Jefferson Circuit Court.

E. G. Leland, V. Kirk, J. L. Wilson, R. R. Wilson, and J. H. Stotsenburg, for appellants.

C. A. Korbly, for appellees.

BUSKIRK, C. J.—The appellees have filed a written motion to dismiss the appeal in this cause, for the following reasons :

1. Because the transcript filed in this court has been, since it was certified by the clerk, materially and wrongfully changed by erasures and interlineations.

2. That counsel for appellants caused to be copied into the transcript certain tax receipts which were not read in evidence, and which are materially different from those that were read on the trial.

3. That the transcript contains an exception to the giving of certain instructions which is not in the original bill of exceptions.

The motion was supported by affidavits. A copy of the motion was served upon counsel for appellants, and they were notified when the motion would be heard.

The parties have had a full hearing. A large number of affidavits have been read by each of them.

It was very fully proved that there was an interlineation, in the handwriting of one of the attorneys for appellants, in the original bill of exceptions, and that the words inserted have been copied into the transcript. But we think it was shown by the weight of testimony that such alteration was made before the bill of exceptions was signed by the judge.

It was also very clearly proved that the alterations and interlineations in the transcript, complained of in the motion, were made by one of the attorneys for appellants. The attorney named, in his affidavit, admitted that such alterations were made by him, but claimed that they were made by authority and before the transcript was certified by the clerk of the court below.

It appears of record that the clerk of the court below employed an attorney of that court to make out the transcript; that when it was made out it was handed by such person to one of the attorneys for the appellants for examination and correction; and that such attorney made the three changes complained of, and that about twenty-five other alterations were also made. In our judgment, it was very clearly and satisfactorily proved, that such alterations and interlineations were made before the transcript was certified by the clerk.

While we are of opinion that the attorneys for appellants acted in good faith, believing they had a clear legal right to do what they did do, we must express our entire disapproval

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of the manner in which the alterations and interlineations were made. It was proper for the attorney who made out the transcript to submit the same to the attorneys for appellants for examination and correction; but counsel for appellants should have noted down on a separate paper the alterations they desired made, and should have submitted the same to the person charged with the preparation of the transcript, who should have made such changes as he thought were right.

An attorney should never, under any circumstances, make any changes or interlineations in a record, in his own handwriting. The changes and interlineations in the bill of exceptions and transcript, being in the handwriting of one of the attorneys for appellants, very naturally and reasonably excited a suspicion in the minds of the attorneys for appellees, that there had been a wrongful tampering with the record, and hence this proceeding.

Counsel for appellants have reason for thankfulness that they were so circumstanced that they have been able to show when and under what state of facts the alterations and interlineations were made. The jeopardy in which they have been placed should be a warning to them and all other attorneys.

Upon the trial of the cause in the court below, the appellees read in evidence certain tax receipts, but they were taken away by the wife of one of the appellees. They were made a part of the bill of exceptions by the words "here insert," but when the person engaged in making out the transcript desired to copy them into the transcript, they could not be found. Counsel for appellants applied to the appellees and their counsel for such receipts, but they all said they did not have them, and did not know where they were. In this emergency, the person making out the transcript, one of the appellants, and one of his attorneys, but not the one who made the alterations in the bill of exceptions and transcript, went to the treasurer's office and procured what were supposed to be duplicates of the original receipts, which were copied into the transcript. The original receipts contained a description of the land upon which the taxes were paid; but those copied into the record do not.

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This substitution might have been made with the consent of the appellees or their attorneys, but not otherwise. Counsel for appellants should have compelled, by proper proceedings in the court below, the production of such receipts, or, if they were shown to be lost or destroyed, should have proved their contents, and thus made them a part of the record. They constituted a part of the files and should not have been taken away, and the person who did so should have been punished for contempt.

Having reached the conclusion, from a very careful consideration of the evidence, that the alterations in the bill of exceptions and transcript were made before they were signed, and that counsel for appellants were not actuated by any wrongful or criminal purpose, we think the appeal should not be dismissed, but that the parties should be left to the usual methods of correcting the record.

The motion is overruled.

ALLSTODT v. THE STATE.

CIRCUIT COURT.—*Prosecution by Affidavit and Information.*—In the absence of an indictment, there can be no prosecution commenced in the circuit court upon an affidavit without an information.

From the Jefferson Circuit Court.

J. L. Knight, for appellant.

C. A. Buskirk, Attorney General, for the State.

BUSKIRK, C. J.—The appellant was prosecuted and convicted in the court below for malicious trespass. The prosecution proceeded solely upon an affidavit. There was no information filed. It has been held, that, in the absence of an indictment, there can be no prosecution commenced in the

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circuit court without an affidavit and information. *Byrne v. The State*, 47 Ind. 120; *Moniger v. The State*, 48 Ind. 383.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to quash the affidavit.

STEPHENSON ET AL. v. FARMER ET AL.

HIGHWAY.—*Establishment by User.*—To entitle a public highway, established by use for twenty years or more, to be entered of record, it should be ascertained and described with the same certainty that would be necessary in establishing a highway originally.

SAME.—If the evidence shows that the road was never surveyed or worked by authority, and that the track was continually changed to accommodate fields and to go around obstructions, it will be insufficient.

From the Monroe Circuit Court.

J. S. S. Hunter, J. W. Buskirk, and L. L. Norton, for appellants.

P. O. Dunning, J. F. Pittman, and J. H. Loudon, for appellees.

BIDDLE, J.—Proceedings to have a road, which, it is alleged, has been used as a public highway for twenty years or more, ascertained, described, and entered of record.

The petition was filed before the board of county commissioners, and the prayer of the petitioners there denied. An appeal was taken to the circuit court, a trial by jury therein had, a verdict for the plaintiffs, motion for a new trial overruled, exception, an order to record the road, and appeal to this court.

The overruling of the motion for a new trial is assigned for error, and we think the motion ought to have been sustained. The evidence is all before us. It does not prove the existence

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of any such highway as that described in the petition. It should have been shown by course and distance sufficiently particular to be practically ascertained and described, that it might be entered of record. The evidence tends to prove that what is claimed to be a highway was cut out without a survey, and never worked by authority; that as new fields were fenced contiguous to it, or obstructions fell into it, the track was continually changed to accommodate the fields and go round the obstructions. All the witnesses agree that the road was frequently changed, and some say even as much as a quarter or half a mile from its original track, and that it never was long in the same place.

We think that to entitle a public highway, established by use for twenty years or more, to be entered of record, it should be ascertained and described with the same certainty that would be necessary in establishing a highway originally.

We are not aware that the statute upon which this proceeding is founded (3 Ind. Stat. 290, sec. 45) has ever received a construction as to the method of having a public highway, established by user, ascertained, described, and entered of record, but we are not without light as to the true principles which should guide us in its construction. See *Epler v. Niman*, 5 Ind. 459; *Barnard v. Haworth*, 9 Ind. 103; *Hart v. The Trustees, etc.*, 15 Ind. 226; *Holcraft v. King*, 25 Ind. 352; *Fisher v. Hobbs*, 42 Ind. 276.

The judgment below is reversed; cause remanded for further proceedings not inconsistent with this decision.

Petition for a rehearing overruled.

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49	235
145	289
49	235
152	639

HUSBAND AND WIFE.—Mortgage.—Marriage of Female Mortgagor to Mortgagee.—An unmarried woman executed a note and a mortgage on her real estate to secure its payment, and afterward married the payee of the

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note, the mortgagee, who, after the marriage, assigned the mortgage and delivered the note to a third person, who brought suit to foreclose the mortgage.

Held, that, by the marriage, the debt and mortgage were discharged, and the action could not be maintained.

From the Bartholomew Circuit Court.

W. W. Herod, F. Winter, and F. T. Hord, for appellant.

S. Stansifer, for appellee.

DOWNEY, J.—Action by the appellant against the appellee and Michael Kinney. It is alleged in the complaint that, on the 8th day of January, 1872; said defendant, Eliza Kinney, then Eliza McCabe and sole, executed a mortgage to said Michael Kinney of certain real estate, described in the complaint, to secure the payment, when due, of a certain promissory note, therein mentioned, made by said Eliza McCabe, and payable to said Michael Kinney; that said Michael Kinney transferred the note, without writing, to the plaintiff, and also transferred the mortgage to him, in writing; that since the execution of the note and mortgage, the defendants have intermarried, etc. A copy of the note and also of the mortgage is filed with the complaint.

Eliza Kinney answered:

1. No consideration.
2. Partial failure of consideration.
3. The same in another form.

4. That since the execution of the note and mortgage, this defendant and her co-defendant intermarried, and after said marriage her co-defendant assigned and transferred said mortgage and note to the plaintiff.

5. That after the execution of the note and mortgage, the defendant and said Michael Kinney intermarried, and after said marriage said Kinney assigned said note and mortgage to the plaintiff, the note by parol and the mortgage in writing; that the assignment of the mortgage was made as collateral security for a debt of said Michael to the plaintiff, and the property so mortgaged was at the time and now is her general property and not other.

The plaintiff replied in denial of the first, second, and third paragraphs of the answer, and demurred to the fourth. The demurrer was overruled, and the plaintiff replied to the fourth paragraph that the real estate described in the mortgage was at the execution of the mortgage, has ever since continued to be, and now is the separate property and estate of said Eliza Kinney, her said husband having no interest therein, and that she, by said mortgage, intended to and did pledge and charge said real estate with said indebtedness.

At this stage of the case, an additional complaint was filed, alleging an indebtedness by parol secured by the same mortgage, an assignment of the mortgage to the plaintiff, etc. A new or additional answer of five paragraphs was filed to this additional complaint. Demurrers were filed to the fifth paragraph of the original complaint and to the fourth and fifth paragraphs of the answer to the additional complaint, and overruled by the court. A demurrer to the reply to the fourth paragraph of the answer to the first complaint was sustained. Upon the demurrers, there was final judgment for the defendant. In the progress of the cause, the name of Michael Kinney silently disappeared. The errors are assigned in the name of Eliza Kinney alone as appellee. The errors assigned relate to the rulings of the court on the demurrers to the fourth and fifth paragraphs of the first, and on the demurrers to the fourth and fifth paragraphs of the answer to the additional complaint, and on the demurrer to the reply to the fourth paragraph of the first answer.

The whole question may be presented thus: Eliza McCabe made a note to Michael Kinney, and executed a mortgage to him on her real estate to secure the payment of the note. Afterward, Eliza and Michael intermarried. Still later, Michael, being indebted to the plaintiff, as security, assigned the mortgage and delivered it and the note to the plaintiff. The plaintiff now seeks to foreclose the mortgage. Eliza insists that, by the intermarriage of herself and Michael, the note and mortgage are avoided, dissolved, or discharged. Had the indebtedness been from Michael to Eliza, a different ques-

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tion would have been presented, in consequence of the statute, which declares, that "personal property of the wife held by her at the time of her marriage," etc., "shall remain her own property to the same extent, and under the same rules as her real estate so remains," etc. Acts 1853, p. 57, as set forth in note 2 to p. 295, 1 G. & H. But there is no such statute which attempts to save the rights of action of the husband against the wife on contracts entered into by her before the marriage. The rule as it exists uncontrolled by statutory enactments is thus stated:

"By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover she performs everything; and is therefore called in our law-French a *feme-covert*, *foemina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant anything to his wife, or enter into covenant with her; for the grant would be to suppose her separate existence; and to covenant with her would be only to covenant with himself; and therefore it is also generally true, that all compacts made between husband and wife, when single, are avoided by the intermarriage." 1 Bl. Com. 442.

"The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost or suspended, during the continuance of the matrimonial union. From this principle it follows, that at law no contracts can be made between the husband and wife, without the intervention of trustees; for she is considered as being *sub potestate viri*, and incapable of contracting

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with him; and except in special cases, within the cognizance of equity, the contracts, which subsisted between them prior to the marriage, are dissolved." 2 Kent Com. 129.

"It is well known, that, at common law, husband and wife are treated, for most purposes, as one person. * * Upon this principle, of the union of person in husband and wife, depend almost all the legal rights, duties, and disabilities which either of them acquire by or during the marriage. For this reason, a man cannot grant anything to his wife, or enter into a covenant with her; for the grant would be to suppose her to possess a distinct and separate existence. And, therefore, it is also generally true, that contracts made between husband and wife, when single, are avoided by the intermarriage." Story Eq., sec. 1367.

"And first, in regard to contracts between husband and wife. By the general rules of law, as has been already stated, the contracts made between husband and wife before marriage, become, by their matrimonial union, utterly extinguished. Thus, for example, if a man should give a bond to his wife, or a wife to her husband, before marriage, the contract created thereby would, at law, be discharged by the intermarriage." Story Eq., sec. 1370.

To the rule thus laid down there are exceptions, which were recognized and enforced mostly in courts of equity. Such are marriage settlements, and the like, the performance of which is intended to take place after the marriage. Even at law, a bond by a husband to his intended wife, upon a condition not to be performed in his lifetime, would not be extinguished by the intermarriage. Other instances, by way of illustration, might be stated. The case under consideration cannot be regarded as coming within any of the exceptions.

We do not think that the fact that the indebtedness in this case was secured by mortgage on the real estate of the wife can make any difference. The debt is the principal thing. The mortgage is only an incident. Whatever satisfies or extinguishes the debt, discharges the mortgage.

So far as the argument against the application of the general rule in this case is based on the statutory provision that

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when an action is between herself and her husband, the wife may sue or be sued alone (2 G. & H. 41, sec. 8), it proves little, for the reason that this was the rule before, in equity. Story Eq., sec. 1368. Possibly a reason for the rule may be found in the fact, that, by the marriage, the husband became entitled to the wife's choses in action, which would include a debt due from him to her, as well as a debt due to her from any other person, and became bound to pay her debts contracted while sole, and therefore would be bound to pay the debt to himself, as well as a debt to any other person.

While, under the present statute, he may not be entitled to her choses in action, on account of the statute to which we have already referred, yet he is bound to pay her debts to the extent of the means he may have received by her.

But whatever may have been the origin of the rule, it is the law in this State, except so far as it has been broken in upon by legislation ; and, in the absence of any statute applicable to this particular case, we must apply the rule, and hold that the court committed no error in its rulings.

The judgment is affirmed, with costs.

BEARDSLEY v. THE STATE.

CRIMINAL LAW.—*Sale of Intoxicating Liquor on Sunday.*—*Statute of 1873.*—Section 10 of the act in reference to the sale of intoxicating liquors, Acts 1873, Regular Session, p. 151, created no offence. It simply limited the license to sell under a permit granted under section 1, by excepting from its protection all sales made on Sunday and on other days and times mentioned in said section. (DOWNEY, J., and BUSKIRK, C. J., dissented.)

From the Elkhart Circuit Court.

R. M. Johnson and J. D. Osborn, for appellant.

O. A. Buskirk, Attorney General, W. C. Glasgow, Prosecuting Attorney, J. A. Simmons, and J. M. Vanfleet, for the State.

BIDDLE, J.—This is a prosecution, by affidavit and information, for selling intoxicating liquor on Sunday, founded on the tenth section of the act approved February 27th, 1873, Acts of the Regular Session 1873, p. 151.

Motion to quash overruled, exception, and appeal.

We are of opinion that section 10 creates no offence whatever. It simply limits the license to sell under a permit granted according to section 1, by excepting from its protection all sales made on Sunday, on the day of any state, county, township, or municipal election, in the township, town, or city, wherein the same may be held, and on Christmas day, the Fourth of July, Thanksgiving day, or on any public holiday, and between the hours of nine o'clock P. M. and six o'clock A. M. on all days.

Any other construction of section 10 would compel us to hold all sales of intoxicating liquors made on the prohibited days, or within the interdicted hours, to be criminal. Such a conclusion would make sales for the most innocent and useful purposes, as for medical, chemical, or mechanical uses, and even the sale of wine for sacramental purposes, unlawful, and subject the vendor to a criminal prosecution. We cannot conclude that the legislature had any such intention in view in enacting the law. If such had been the intention, it would be quite useless to prohibit such sales on certain days, and within certain hours of the day, and leave them unprohibited all the rest of the year. The sales mentioned in section 10 must be held to mean such sales as are prohibited by section 1, where the liquor is to be drunk on the premises, and which a permit will not justify.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion to quash the affidavit and information.

DOWNEY, J.—I do not assent to the opinion of the majority of the court in this case, pronounced by my brother BIDDLE. As the law upon which the case is predicated is repealed,

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the proper decision of the question is of less importance than it would be if the law was yet in force. But, notwithstanding this, I am unwilling to allow the case to be decided on the ground upon which it is placed, without an expression of my views.

The position of the majority of the court is, "that section 10 creates no offence whatever. It simply limits the license to sell under a permit granted according to section 1, by excepting from its protection all sales made on Sunday," etc. It is said, that "any other construction of section 10 would compel us to hold all sales of intoxicating liquors made on the prohibited days, or within the interdicted hours, to be criminal ;" and fears are expressed that such a construction would make sales for the most innocent and useful purposes, as for medical, chemical, or mechanical uses, and even the sale of wine for sacramental purposes, unlawful, and subject the vendor to criminal prosecution. Let us see what the sections of the act bearing on the question are.

The first section of the act reads as follows: "Be it enacted," etc., "that it shall be unlawful for any person or persons, by himself or agent, to sell, barter, or give away for any purpose of gain, to any person whomsoever, any intoxicating liquors to be drunk in, upon, or about the building or premises where the liquor is sold, bartered, or given away, or in any room, building, or premises adjoining to or connected with the place where the liquor is sold, bartered, or given away for the purpose of gain, until such person or persons shall have obtained a permit therefor from the board of commissioners of the county where he resides, as hereinafter provided." Acts 1873, p. 151.

By the fourteenth section, the punishment for a violation of the first section is a fine of not less than ten dollars nor more than fifty dollars, or imprisonment in the county jail not less than ten nor more than thirty days. Acts 1873, p. 156.

The tenth section of the act reads as follows: "A permit granted under this act shall not authorize the person so receiving it to sell intoxicating liquors on Sunday, nor upon the

day of any state, county, township, or municipal election, in the township, town or city where the same may be held ; nor upon Christmas day, nor upon the Fourth of July, nor upon any Thanksgiving day, nor upon any public holiday, nor between nine o'clock P. M. and six o'clock A. M. ; and any and all sales made on any such day, or after nine o'clock on any evening, are hereby declared to be unlawful, and upon conviction thereof, the person so selling shall be fined not less than five dollars nor more than twenty-five dollars for each sale made in violation of this section." Acts 1873, p. 154.

I concede that the tenth section "limits the license to sell under a permit granted according to section 1, by excepting from its protection all sales made on Sunday," etc., but I do not concede that this is the only operation or effect of section 10. After having performed this office, the section proceeds to say: "And any and all sales made on any such day, or after nine o'clock on any evening, are hereby declared to be unlawful, and upon conviction thereof, the person so selling shall be fined not less than five dollars nor more than twenty-five dollars for each sale made in violation of this section."

The language is, "are hereby declared to be unlawful ;" not made unlawful by some other section or act, but "hereby."

• How can it be held that this section merely limits the license to sell under the permit, by excepting from its protection sales made on Sunday, etc.? It declares "any and all sales made on any such day," etc., "unlawful," and inflicts a penalty different from that inflicted for a violation of the first section, "for each sale made in violation of this section ;" not for sales in violation of the first section, but for sales made in violation of "this section"—the tenth section.

The construction, that section 10 relates only to sales made by persons holding permits and of liquors to be drunk at the place where sold, can never secure my concurrence.

Section 10, by language as strong as words can express it, applies to "any and all sales." The language is the assertion of a universal affirmative, and must include all, or all reasoning must be at fault. All sales made on Sunday are unlawful.

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Douglass S. Beardsley made a sale on Sunday. Does it not necessarily follow, that the sale made by Douglass S. Beardsley was illegal?

The majority of the court seem to suppose that all those who sell without having a permit so to do must be indicted under the first section, for selling without a permit. Let us suppose that Douglass S. Beardsley had been indicted in this case for selling on Sunday without a permit, what would have been the attitude of the State in the prosecution? It would have been prosecuting him for doing an act without a permit, when there was no person or power in existence which could have given him a permit to do the act; for it is expressly declared in section 10, that no permit shall confer upon him that right.

The tenth section, in my judgment, prohibits all sales on the days and at the times therein mentioned, which come within the spirit of the act.

The information in this case does not allege that the defendant had no permit, and this shows conclusively that the prosecution is not based upon, and cannot be sustained on, the first section for selling without a permit. But, if our view is correct, the information can be sustained under the tenth section, because, under that section, it is immaterial whether the defendant had a permit or not.

The apprehensions of the majority of the court, that any other construction of the tenth section than that adopted by them would require us to punish those who might sell intoxicating liquors for medical, chemical, or mechanical purposes, or wine for sacramental purposes, are surely without any foundation. So, we think, are the fears sometimes expressed that some one might be punished, under the tenth section, for selling by wholesale.

It never has been held, under any law of this State relating to the retailing of liquors, that the law should be held applicable to sales honestly made for medical, chemical, or mechanical purposes, or to vending by wholesale, and, I presume, never will be so held, unless a law shall be passed different

from any that has heretofore come before the court for construction. A plain reason for this is, that such sales do not come within the spirit and meaning of the statute. The mischief to be suppressed is not the sale of liquors for such uses, or by wholesale.

It has several times been held by this court, that where there was no exception of sales for medical purposes, etc., contained in the statute, still such sales were not criminal. *Donnell v. The State*, 2 Ind. 658; *Thomasson v. The State*, 15 Ind. 449; *Jakes v. The State*, 42 Ind. 473.

In the case of *Thomasson v. The State*, *supra*, the court said: "It is objected that no exceptions are made, in the law, of sales for medicinal or sacramental purposes;" and, in disposing of the question, said: "The court will make the exceptions where proper."

For further views on the tenth section, see the dissenting opinion in *Morris v. The State*, 47 Ind. 503.

In my opinion, the affidavit and information in the case under consideration are sufficient.

BUSKIRK, C. J.—I concur in the above opinion.

NEEDHAM v. GILLASPY ET AL.

JUDGMENT.—*What Necessary to Constitute a Judgment.*—Where lands were assessed with benefits for the construction of a gravel road, and the owner appealed to the circuit court, where the assessment was reduced, and certain sums were ordered to be assessed against certain tracts of land, and other tracts were ordered to be released from assessment, and the action of the court was ordered to be certified to the county auditor, with directions to correct the tax duplicate, to correspond with the assessment made by the court;

Held, that such orders of the court did not constitute a judgment upon which execution could be issued.

SAME.—To constitute a valid judgment, the word "recover" should be used,

49	245
141	147
49	245
145	175
49	245
1158	34

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and the amount of recovery should be stated, where a money judgment is rendered, and in other cases appropriate words should be used, having reference to the relief granted.

From the Johnson Circuit Court.

R. M. Johnson and J. L. White, for appellant

S. P. Oyster and D. Howe, for appellees.

BUSKIRK, C. J.—This was a proceeding on the part of appellant to enjoin Gillaspy, as sheriff of Johnson county, from levying upon and selling the property of appellant upon an execution issued upon what is claimed to be a judgment, in favor of the Shelbyville and Franklin Gravel Road Company, against appellant, in the Johnson Circuit Court.

The gravel road company was made a defendant, and filed an answer, to which appellant demurred. The demurrer was overruled, and, appellant refusing to plead further, final judgment was rendered for the appellees.

The error assigned is for overruling the demurrer to the answer of the gravel road company.

The case made may be briefly stated, as follows: The lands of the appellant were assessed with benefits for the construction of said road; the appellant, under and in pursuance of the provisions of the act of May 14th, 1869, 3 Ind. Stat. 538, appealed from such assessment to the circuit court; in that court the assessment made was reduced, and the company was taxed with the costs of such appeal. It is quite plain, that under such act the court possessed the power to render a judgment against the appellant for the amount assessed, which could have been enforced by an execution, but the question which we are required to decide is, whether the judgment rendered is such as authorized the issuing of an execution thereon. The judgment rendered was as follows:

“It is ordered and adjudged by the court, that the assessment for the construction of the said gravel road, upon the lands of the said William Needham, be as follows: Upon the east half of the north-west quarter of section 16, township 12, range 5 east, eighty acres, one hundred and fifty dollars; upon

the west half of the north-east quarter of section 16, township 12, range 5 east, eighty acres, one hundred and fifty dollars; upon the north-west quarter of section 10, township 12, range 5 east, one hundred and sixty acres, one hundred and sixty dollars. And it is further ordered, that upon part of the north-east quarter of the north-east quarter of section 16, township 12, range 5 east, twenty-three acres, and upon part of the north-west quarter of section 15, township 12, range 5 east, twenty acres of the lands of the said William Needham, nothing be adjudged for the construction of said gravel road; and that the clerk of this court make out and certify to the auditor of Johnson county a true and complete transcript of this judgment, and that said auditor correct his tax duplicate, so as to make the same correspond with this assessment."

Upon the above order, the execution in question was issued. The case proceeded in the court below upon the supposition that the power of the court was limited to an ascertainment of the true amount of benefits; and when this was done, the court ordered the clerk to certify the assessment made to the auditor of the county, who was directed to correct his tax duplicate, so as to make the same correspond with the assessment made by the court. The court simply made an assessment, and required the auditor to correct his tax duplicate accordingly. There was no judgment in favor of the gravel road company against the appellant. It is not provided that the company shall recover of the appellant any sum of money. To constitute a valid judgment, the word "recover" should be used, and the amount of the recovery should be stated, where a money judgment is rendered, and in other cases, appropriate words should be used, having reference to the relief granted.

In 3 Bouvier's Institutes, par. 3298, it is said: "The language of the judgment is not, therefore, that 'it is decreed,' or 'resolved,' by the court, but 'it is considered,' (*consideratum est per curiam*) that the plaintiff recover his debt, damages, possession, and the like, or that the defendant do go quit. This implies that the judgment is not so much the decision of

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the court, as the sentence of the law, pronounced and decreed by the court, after due deliberation and inquiry."

It is admitted by counsel for appellees, that the judgment is informal, but it is contended that it is not void. We are not considering matters of form. There was no attempt, on the part of the court, to render a judgment in favor of the gravel road company against the appellant; but, as we have seen, there was an assessment of benefits and a remission of the cause to the county auditor, to have the same placed upon the tax duplicate and collected by the county treasurer as other assessments are collected. The order of the court cannot be enforced by execution. The clerk had no power to issue an execution. The sheriff had no right to levy upon the property of the appellant.

The court erred in overruling the demurrer to the answer.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the demurrer to the answer, and for further proceedings, in accordance with this opinion.

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159	66

CRIMINAL LAW.—Indictment.—Receiving Stolen Goods.—An indictment charging that the defendant did feloniously buy, receive, conceal, and aid in the concealment of certain property, belonging to certain persons named, which, prior to the time it was so bought, etc., had been feloniously stolen, etc., by some person unknown, the defendant, at the time he so bought, etc., the same, well knowing that the property had been stolen, is good, though it does not show the time when it was stolen, and that it was the subject of larceny at the time it was so received.

SAME.—Alibi.—If the evidence touching an *alibi* is sufficient to raise a reasonable doubt of the guilt of the accused, it should be considered, although the *alibi* does not cover the whole time during which the crime was committed.

From the Marion Criminal Circuit Court.

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S. A. Huff, F. J. Mattler, and P. Rappaport, for appellant.

C. A. Buskirk, Attorney General, *J. M. Cropsey*, Prosecuting Attorney, and *R. D. Doyle*, for the State.

BIDDLE, J.—Prosecution for receiving stolen goods, with guilty knowledge. The charging part of the indictment is as follows:

“That Moritz Kaufman, on the 28th day of December, A. D. 1874, at and in the county of Marion, and State aforesaid, did feloniously buy, receive, conceal, and aid in the concealment of eleven hogs, of the value of twelve dollars each, the said hogs then and there being the property of Samuel Hanway, George W. Parker, and Oscar W. Kelly; which said hogs, prior to the time they were so bought, received, and concealed by said Kaufman, had been feloniously stolen, taken, and carried away, at said county, by some person to said jurors unknown; he, the said Kaufman, at the time he so bought, received, concealed, and aided in the concealing of said hogs, well knowing that the same had been stolen, contrary,” etc.

Plea, not guilty; trial by jury; verdict of guilty; motion for a new trial overruled; motion in arrest of judgment overruled; exception taken to each ruling, and appeal to this court.

There was no motion to quash the indictment, yet the appellant insists that it is insufficient to support the judgment against a motion in arrest. The point taken against it is, that it does not show that the hogs were under the larceny, and in a larcenous possession, at the time it is alleged that he so received them; that, for aught the indictment shows, the hogs might have been stolen at some indefinite period before the time they were received, yet, at the time, have been freed from the larceny, and in the honest possession of those who delivered them to him, and that a knowledge of such larceny would not be criminal.

The form of the indictment, doubtless, shows a relaxation from the strictness of common law pleading, yet it conforms to authorized precedents, which have been repeatedly approved under both English and American statutes, similar to our own. The words charging that the appellant “did feloniously

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receive," etc., are held to supply the more formal allegation omitted in the indictment. That he "did receive," etc., could not be felonious, unless the hogs were the subject of larceny at the time he so received them. The appellant, therefore, was not put in any greater danger on the trial, nor in any way embarrassed in his defence, for want of the omitted averment in the indictment. It informed him fully of the charge against him and of what he might expect to meet on the trial. Whart. Precedents, 450; Whart. Crim. Law, sec. 1888; *The State v. Weston*, 9 Conn. 527; *The State v. Smith*, 37 Mo. 58; *Swaggerty v. The State*, 9 Yerg. 338; *Rex v. Jervis*, 6 C. & P. 156; *Regina v. Martin*, 9 C. & P. 215; *Holford v. The State*, 2 Blackf. 103; *Pelts v. The State*, 3 Blackf. 28; *Gandolpho v. The State*, 33 Ind. 439.

The evidence is all before us. It shows us, on the part of the State, that the hogs were taken from their feeding place, in a yard, about four and a half miles north of Indianapolis, on the night between Monday the 28th day of December, 1874, and Tuesday the 29th, the next day. They were missed on Tuesday morning at sunrise, tracked to the appellant's slaughter-house in Indianapolis, and found in his close-pen, fastened up.

After the State had closed her evidence, the defendant called a witness, Henry Nicolai, who testified, that "on Monday night I went with the defendant to No. 43 south Illinois street, to Aug. Mai's jewelry store; we stayed there from seven to half past eight o'clock, waiting for Mai; he was gone to supper; defendant and several others were there; we went from there to Washington Hall; defendant and Mr. Fetsch were with me; we were there half an hour; drank beer, and had a little conversation; we went home from Washington Hall, and got home between half past nine and ten o'clock; defendant went with me; I then lived up stairs in Kaufman's house; saw him that night at ten o'clock; saw him in the morning at breakfast, a little before seven o'clock; heard the watchman wake Kaufman in the morning at half past four or five o'clock, and heard Kaufman answer."

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There was also evidence on the part of appellant tending to show that the Monday night spoken of by this witness was the Monday night upon which the hogs were stolen.

With this evidence before the jury, the court gave them the following instruction:

"The defendant having introduced evidence for the purpose of establishing an *alibi*, or, in other words, to show that he was not guilty, for the reason that he was at a different place, if he failed to cover the whole time necessary when the crime may have been committed, then you would be warranted in paying no attention to such testimony."

As a rule of law, this instruction is erroneous. An *alibi* is a legitimate defence, and if the evidence touching it was sufficient to raise a reasonable doubt of the appellant's guilt in the minds of the jury, it should have been considered, although the *alibi* did not cover the whole time during which the crime was committed. The case of *French v. The State*, 12 Ind. 670, is in point. The same principle is supported in the cases of *Adams v. The State*, 42 Ind. 373, and *Binns v. The State*, 46 Ind. 311.

There is no evidence connecting the appellant with the charge before Wednesday morning next succeeding the Tuesday on which the hogs were found in his slaughter-pen. His guilty knowledge, as charged, is left to inference from facts arising subsequent to the transaction.

Although the evidence is all before us, we cannot clearly see that the appellant was not injured by the instruction complained of.

There was an objection made to certain hearsay evidence offered on behalf of the appellant, in the testimony of August Bruno and Charles Krist, and sustained by the court, but the ruling was so evidently correct that we do not think it necessary to more particularly notice the point.

There was also a complaint made against one of the jurors for alleged misconduct during their retirement, and while they were considering their verdict; but, trusting that nothing of

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the kind may occur again, and as it is not necessary to the decision of the case, we leave it unnoticed.

The judgment is reversed; the cause is remanded, with instructions to sustain the motion for a new trial. The clerk will issue the proper order for the return of the prisoner.

 SULLIVAN v. LEARNED ET UX.

PARENT AND CHILD.—Custody of Child.—Unconditional Decree in Divorce Cause Conclusive.—Where a divorce is granted, and the care, custody, and education of a minor child is given to one of the parties, without limitation as to time or reservation of power to change it, the decree is conclusive even in a direct proceeding to modify or change it, as well as in all collateral proceedings. (DOWNEY and PETTIT, JJ., dissented.)

SAME.—Court May Reserve Power to Modify Decree.—In decreeing a divorce, a court may reserve the power to open, alter, and modify the decree, in reference to the care and custody of minor children, by expressly reserving the power, or by providing that the custody shall continue until the further order of the court.

From the Madison Circuit Court.

J. W. Sansberry, E. B. Goodykoonts, and H. D. Thompson,
for appellant.

J. A. Harrison, for appellees.

BUSKIRK, C. J.—The record in this cause presents for our decision two questions:

First. Did the court below possess the power to grant the relief asked?

Second. Did the facts recited in the complaint justify the granting of the relief prayed for?

It appears from the complaint, that Jeremiah Sullivan and Drusilla Sullivan were husband and wife until the 2d day of February, 1870, when, by the judgment of the Madison Common Pleas, the marriage contract was set aside, and the par-

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ties were divorced ; that, by such decree, the care, custody, and education of Lawrence Sullivan, one of their children, was given to the said Drusilla, and the care, custody, and education of Bernard Sullivan was given to Jeremiah ; that, subsequent to such divorce, the said Drusilla had intermarried with her co-defendant Judson Learned ; that they had removed to Kokomo, in said State ; that they contemplated removing to the State of Minnesota, taking with them the said Lawrence ; that the plaintiff is informed, and so charges, that said defendants and other members of their family are, at times, very cruel in their treatment of the said child ; that said defendants are not proper persons to have the custody of the said child ; that the said Drusilla has no separate property or effects of her own right, with which to maintain the said child ; and that said child has no property or means with which to support itself.

The prayer of the complaint was for the modification of the former decree, and that he should have the custody and control of his said son Lawrence.

The appellees filed a cross complaint, to which the appellant demurred. The court overruled the demurrer to the cross complaint, but carried it back and sustained it to the complaint, and this ruling is assigned for error.

The decree giving to Drusilla the care, custody, and education of Lawrence was absolute and unconditional. There was no limitation as to time. There was no reservation of power to alter or change it. There was no provision that she should have such custody until the further order of the court. The decree was absolute and final. In such case, it is conclusive between the parties in all collateral proceedings. *Williams v. Williams*, 13 Ind. 523.

But this is a direct proceeding to modify and change the decree as to the custody of the children, and we are required to determine whether, under the statute of 1852, the court below possessed the power to so modify such decree.

It is provided, by section 9 of the act concerning divorces, Acts 1838, p. 244, that "the court, in making a decree of

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divorce, shall take into consideration the age and sex of the children, if any, and shall make orders, and from time to time may alter or amend the same, respecting the custody, sustenance and guardianship of the said children."

Section 62 of chapter 35, R. S. 1843, reads as follows:

"Upon the dissolution of a marriage by a sentence of nullity, or a decree of divorce, the court may make such decree for the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children, or any of them, shall remain, as to the court shall seem proper and expedient, having due regard to the age and sex of such children; and from time to time, after the rendition of such decree, on the petition of either of the parents, the court may revise and alter such decree concerning the care, custody, and maintenance of the children, and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children shall require."

Section 21 of the act of May 13th, 1852, concerning divorces, provides, that "the court in decreeing a divorce shall make provision for the guardianship, custody, and support and education of the minor children of such marriage." 2 G. & H. 353.

By the above quoted section, it is made the imperative duty of the court, in decreeing a divorce, to make provision for the guardianship, custody, and support and education of the minor children. Such provision constitutes an essential part of the decree, and has the same force and effect as any other portion of the decree.

In *Williams v. Williams, supra*, it was held, that a decree concerning the custody of children was, between the parties, conclusive; and the court expressly withheld any opinion as to the power of the court to alter or modify it.

It is to be observed that the statute of 1852 does not, as do the codes of 1838 and 1843, contain a provision giving to the court the power to alter and modify the decree concerning the custody of the children.

The legislature of 1859, in an amendatory act of the divorce

law, provided, that "parties against whom a judgment of divorce has been heretofore or shall be hereafter rendered, without other notice than publication in a newspaper, may have the same opened at any time so far as relates to the care, support, and custody of the children." 2 G. & H. 349, sec. 7. *Ewing v. Ewing*, 24 Ind. 468.

Section 21 of the divorce act of March 10th, 1873, Acts 1873, p. 107, is the same as sec. 21, above quoted, of the act of May 13th, 1852.

Section 6 of the act of 1873 contains the same provisions as section 7 of the amendatory act of 1859.

The failure of the legislature of 1852 to re-enact the provisions of the code of 1838 and 1843 is very significant, and should have a controlling influence in the decision of the question under examination. But the acts of 1859 and 1873 conferring upon the court the power, where there has been only constructive notice, to open, change, and modify the decree concerning the care, support, and custody of the children, contain legislative constructions of the act of 1852, which ought to be conclusive of the question, that it was the intention of the legislature of 1852 to provide, that where the decree was absolute and final, it was to be regarded as conclusive between the parties.

It is provided by section 43 of the code, 2 G. & H. 66, that parties against whom a judgment has been rendered without other notice than the publication in a newspaper, herein required, except in cases of divorce, may, at any time within five years after the rendition of the judgment, have the same opened, and be allowed to defend.

The code further provides, that "no complaint shall be filed for a review of a judgment of divorce." Section 586, 2 G. & H. 279.

It was held, in *Ewing v. Ewing*, *supra*, that divorce cases are not embraced by sections 99 and 356 of the code.

After a very careful examination of the English and American cases, we have been unable to find any case which holds, in the absence of a statute similar to the provisions in the codes

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of 1838 and 1843, and in the absence of a reservation in the decree of the power of modification, that a decree in reference to the custody, care, support, and education of the children of the marriage can be opened and altered.

It is true, that Bishop, in his work on Marriage and Divorce, says that such a decree may be opened, and altered and modified, and, in support of such proposition, refers to quite a number of New York cases. We have examined all of the cases cited, and find that the ruling in each case was based upon a statute of that State, which, in express terms, like the statutes of this State above cited, provided that the decree in reference to the care, support, custody, and education of the children, might be opened, altered, and modified. Such cases cannot be regarded as authority, in the absence of similar statutes.

We are also referred to the case of *Bush v. Bush*, 37 Ind. 164, where this language is used, in speaking of the decree in reference to the care, support, custody, and education of the children: "This order is subject to the control of the lower court, and may be changed upon good cause shown."

We have examined the record in that case, and find that the decree expressly reserves the power to alter and change the decree in reference to the children. The remark quoted was made in view of the fact that the decree was conditional and subject to change.

The case of *Darnall v. Mullikin*, 8 Ind. 152, was a proceeding to modify a decree, in reference to the custody of the children, which was rendered under the code of 1843, and the decree in express terms provided, that the mother should have the custody until the further order of the court.

It is well settled that a former decree in a suit in equity between the same parties, and for the same subject-matter, is a good defence in equity, even although it be a decree merely dismissing the bill, if the dismissal is not expressed to be without prejudice. Section 1523, 2 Story Eq. Juris. 861, and authorities cited.

Freeman on Judgments, sec. 313, lays down the doctrine,

that a decree of divorce, so far as it relates to the *status* of the parties, is binding upon all the world, and that in other respects it has the same force and effect as other judgments.

This is a question of the custody of the children of the marriage, and not of their guardianship. The statute regulating the appointment and removal of guardians has no application to the question under examination. Besides, such statute, in express terms, gives to the court the power to remove guardians for cause shown. Instead of this statute supporting the position contended for by counsel for appellant, it affords another legislative construction, that the court would have no power to remove guardians in the absence of such express authority. If the power to modify a decree as to the custody of children, or to remove a guardian, was an inherent attribute of courts and could not be parted with, surely the legislature would not have deemed it necessary to confer such power by express provisions in the many instances given in this opinion ; and similar provisions will be found in reference to executors and administrators.

We think there is no doubt that the courts of this State may, in decreeing a divorce, make a temporary and provisional order in reference to the care, custody, support, and education of the minor children of the marriage, and may, in such decree, reserve the power to open, alter, and modify, as the best interests of the parents and children may render necessary and proper. This may be done by expressly reserving the power, or by providing that the custody shall continue until the further order of the court. By such provisional orders, the court would retain jurisdiction of the cause, and jurisdiction over the persons could be obtained by service of notice of an application to open and modify such decree.

In the opinion of the court, no final and absolute decree should ever be entered. The change in the circumstances and habits of the parents or other custodians will frequently necessitate a modification of the decree, and the power to do

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so should never be parted with, by the courts, by making a final and absolute decree.

The condition of the child in controversy is no worse than if its parents were living together as husband and wife, or if one of them was dead. The courts possess the same power to protect such child from cruelty and abuse as they would possess if it was living with both its parents.

But, conceding that the court below possessed the power to open, alter, and modify the decree, the matters stated in the complaint were wholly insufficient to justify its exercise. In a legal sense, there are no facts stated. There are some conclusions stated from information, the source and reliability of which are not given.

The demurrer to the cross complaint was properly carried back and sustained to the complaint.

The judgment is affirmed, with costs.

DOWNEY, J.—So far as the above opinion announces it as the law, that the court making an order for the guardianship and custody of the minor children of the parties, on granting a divorce, can not afterward, on a proper application to it, change the guardianship and custody of the children, unless the power or right to do so be expressly reserved in the order, I can not concur therein. I can not think a parent or other person appointed as guardian or custodian of a child, under such circumstances, can have any vested and perpetual right to the guardianship and custody of the child. The court is not required to appoint one of the parents as the person who shall be the guardian and have the custody of the child, but may appoint one who intervenes, or any other suitable person. The court is required by the statute "to make provision for the guardianship, custody," etc., of the child, but may make its own choice as to the person who shall be appointed. If the appointment, when once made, is irrevocable, unless the right to revoke it is expressly reserved, then no matter how circumstances may change, how unfit the person may become, to whom the guardianship and custody may have been com-

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mitted, there can be and is no remedy ; the child must suffer the consequences, however disastrous they may be. The court has tied its own hands and is powerless to grant any relief. I do not think the court can thus part with its power and deprive itself of the authority which it possesses. There is a plain difference between the decree or judgment, by which the divorce is granted, and the order which the court is authorized to make, as an incident, with reference to the guardianship and custody of the infants. I concede, also, that when an order has been made appointing a guardian for the children and assigning their custody, this appointment must, like any other appointment of a guardian or custodian, control the rights of the parties until it is changed by the order of the court which made it, in a proceeding for that purpose.

Hence, it has been held that the guardianship, etc., can not be changed on a proceeding by *habeas corpus*. *Williams v. Williams*, 13 Ind. 523. But this is exactly the rule with reference to any other guardianship.

In my opinion, the subject of such an order is one over which the court can not part with its control ; but the children, under such circumstances, become the wards of the court, and the court is bound, independent of any statute or reservation of authority, to exercise its supervisory care over them from time to time, and as often as their welfare may require. Every court having appointed a guardian or person to have the custody of an infant necessarily retains its power and authority to remove the guardian or change the custody of the infant. Accordingly, it is provided by statute as follows: "The court by whom or by whose clerk any guardian has been or may be appointed, or the judge thereof, in vacation, may, at any time, remove such guardian, upon written application of his wards or ward, or any persons in behalf of said wards or ward, for habitual drunkenness, neglect of his duties, incompetency, fraudulent conduct, removal from the county, or any other cause which, in the opinion of such court, or the judge thereof, in vacation, renders it for the interest of the ward that such guardian shall be removed, he

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having five days notice thereof, except that where such guardian so conceals himself that notice can not be served, or his residence is unknown, or he has removed from the State, no notice shall be required." Acts 1867, p. 130.

The act is an amendment of sec. 11, p. 568, 2 G. & H., on the subject of guardian and ward. This statute confers the power to remove upon every court, by whom or by whose clerk any guardian has been appointed, and it relates to any and every kind of guardian. It is *in pari materia* with the divorce law, which authorizes the court to provide for the guardianship and custody of the minor children of the parties when a divorce is granted. But independent of this statute, I think the court has full and complete power over the subject, whether it has, in form, reserved the power in the orders or not.

I do not feel the force of the argument drawn, in the majority opinion, from the fact that the statutes of 1838 and 1843 expressly reserved the power of the court to change the guardianship and custody of children under such circumstances. This consideration, to my mind, has just the opposite tendency. It tends to show what should be the construction given to the present statutes, as it can hardly be presumed that the legislature would purposely and suddenly make such an unaccountable change in the law on this subject. The rule by which statutes *in pari materia* are to be construed together allows us to look at repealed or superseded statutes on the same subject, in order to arrive at the proper construction of an existing statute. The fact that the legislature has provided for opening judgments or orders of this kind, in one class of cases, does not prove that it could not have been done in such or in all cases without such legislation.

The opinion of the majority of the court avoids, or attempts to avoid, the force of the statute authorizing all courts to remove any guardian, by saying the question here is "a question of the custody of the children of the marriage, and not of their guardianship." This is putting an order for the mere custody of the child, if it is a different thing from its guar-

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dianship, on higher ground, and making it more perpetual and irrevocable than a regular guardianship. It is conceding that the court may change the guardianship of the child, but can not change its custodian.

If one to whom the custody of a child is given is not its guardian, then he must be something less than a guardian and, for this reason, more perfectly under the control of the court than a guardian. I have made no extended search for authorities upon the point in question. It seems, however, to be the law in England, that such orders are subject to be modified and changed by the court as the circumstances of the case may require. Thus in *March v. March*, Law Reports, 1 P. & D. 437, the parties had been divorced, and the case was afterward before the court with reference to the custody of the only child of the marriage, a boy of six years, and the judge ordinary said: "Any order the court makes for the custody of a child is in itself temporary, and may be set aside or varied on a change of circumstances, or other sufficient cause shown."

This language expresses my views exactly, and it was used in a case unaffected by statute, and where no power or authority had been expressly reserved to change or modify the order.

PETTT, J., unites in the foregoing dissenting opinion.

HOLLINSBEE v. RITCHEY.

PRINCIPAL AND SURETY.—*Payment by Surety.*—When a surety pays a debt, he must be legally bound for it to enable him to recover the amount paid of the principal, and the principal must also, at the same time, be under a legal obligation to pay the debt.

SAME.—*Surety on Replevin Bond.*—*Voluntary Payment by Surety.*—In an action of replevin, where a bond is filed and possession of the property obtained, and afterward the suit is dismissed by agreement of the parties, the plaintiff agreeing to pay the defendant a certain sum, but where no

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judgment is rendered, if the surety on the replevin bond afterward, without the request of the plaintiff, pays the amount agreed to be paid to the defendant, he can not recover the same of his principal, the payment being voluntary on the part of the surety.

From the Johnson Circuit Court.

G. M. Overstreet and *A. B. Hunter*, for appellant.

S. P. Oyler and *D. Howe*, for appellee.

DOWNEY, J.—The appellant sued the appellee for money paid for the use and benefit of the defendant.

The defendant answered:

1. A general denial.

2. That before the commencement of the action he and said plaintiff were partners in the business of buying, selling, and trading horses, mules, and other stock; that upon final settlement of their accounts, as such partners, there would be found to be, and now is, due to defendant from plaintiff a balance of five hundred dollars, which said sum defendant offers to set off against the amount due plaintiff, and prays judgment for the residue.

Reply in denial of the second paragraph of the answer.

Trial by the court, and special finding and conclusions of law, as follows:

“That on the 20th day of February, 1865, the defendant commenced a suit in replevin in the Decatur Court of Common Pleas against Samuel Sheek, to recover a horse; that he executed a replevin bond with the plaintiff as his surety therein, and the horse was delivered to him and by him taken away; that on the 17th day of January, 1866, the said Ritchey dismissed his said suit of replevin, at his costs, and on Ritchey's agreement to pay Sheek the amount he had paid for the horse, which was one hundred and ninety dollars; that on the 19th day of January, 1866, the plaintiff, Hollinsbee, as such surety in said bond, paid to Sheek the value of said horse and to the clerk of the court the costs of said action, amounting in all to the sum of two hundred and sixteen dollars; that it is not shown, by a preponderance of the evi-

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dence, that any express request was made by Ritchey to Hollinsbee to pay said amount or any part thereof; that this action was brought by the plaintiff to recover the amount from said Ritchey so paid; that in the matters of set-off pleaded, there was nothing owing from the plaintiff to the defendant.

“ And upon these facts the court finds and states the following conclusions of law :

“ That a surety on a replevin bond may not pay off the same without an express request of the principal; and if he does so pay it without such request, he can not recover the amount paid, or any part thereof, from said principal.” The special finding was made at the request of the plaintiff, and is signed by the judge.

The errors assigned, of which, in form, there are three, present the question as to the correctness of the conclusions of law stated by the court.

Counsel for the appellant urge that when the relation of principal and surety exists between the parties, a previous request to the surety to pay is not necessary to authorize him to discharge the obligation and to give him a right of action for the amount paid; that it is not necessary for the surety to wait until a suit has been brought against him, or till a judgment has been obtained, but that he may pay at once when the obligation has matured.

Counsel for appellee concede the correctness of these propositions, but insist that they do not meet the case to be decided. They insist:

1. That when the surety pays the debt he must be legally bound for it; for if he was never legally bound, or if having once been legally bound, he had been discharged of his obligation, the payment would be voluntary, and he could not recover the money so paid any more than one not a surety could recover money voluntarily paid by him in the discharge of the debt of another person.

2. That it must also appear that, at the time of the payment, the principal himself was under a legal obligation to pay; for

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if the principal was not legally liable, or if he then had an election to make the payments or to do something else, the surety could not, by a mere voluntary payment, vary the rights of the principal or impose upon him any greater or different obligation than that which he was under at the time the payment was made.

We think these propositions are correct and well stated.

It is next contended by counsel for the appellee, that when the parties to the replevin suit agreed to its dismissal, and that the plaintiff therein should pay to the defendant the amount he had paid for the horse, which was one hundred and ninety dollars, this was a new contract or such a material and important change in the first contract, that the surety was thereby discharged.

The undertaking in the action of replevin requires of the plaintiff in the action three things:

1. That he will prosecute his action with effect and without delay.

2. That he will return the property to the defendant, if return be adjudged by the court; and,

3. That he will pay to the defendant all such sums of money as may be recovered against him by the defendant in the action for any cause whatever. 2 G. & H. 129, sec. 132.

In any of these events, in the action of replevin, the surety on the undertaking or bond is responsible; but if the parties to the action make a new and further arrangement, different from any of them, and the case is disposed of according to such new arrangement, the surety can not be held bound by the undertaking. He has a right, like any other surety, to stand upon the contract which he has made, and the parties to the action can not, without his consent, make any material alteration in the contract, without releasing him. In this case, the action did not terminate in a judgment, for the performance of which the surety was responsible by virtue of the undertaking. The parties agreed that the action of replevin should be dismissed, at the costs of the plaintiff, and that Ritchey, the plaintiff, should pay the defendant in the replevin

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suit, Sheek, the amount he had paid to some one else, but to whom is not shown, for the horse, which amount was one hundred and ninety dollars. It seems to us clear that Hollinsbee, the appellant, was under no legal obligation to pay this amount. There does not appear to have been any judgment in the replevin suit for the amount agreed upon, or for the costs. For anything that appears, the action was dismissed, and Sheek relied alone upon the promise of Ritchey for the payment of the amount agreed upon. The defendant in the action of replevin could not have recovered on the bond on the first ground of liability, that is, the failure of the plaintiff to prosecute his action with effect and without delay, for the reason that the action was terminated by the agreement of the parties, and not by any failure of the plaintiff in its prosecution. He could not recover on the second ground, that is, for failure to return the property, for the reason that no return was adjudged, and the agreement of the parties evidently contemplated that the plaintiff should retain the property. And he could not recover on the third ground, that is, on the ground of any sum of money recovered in the action of replevin by the defendant therein, for there does not appear to have been any recovery in the action for any amount. It seems to us, therefore, that the payment made by the appellant must be regarded as a voluntary payment, and that the decision of the circuit court was substantially correct.

The judgment is affirmed, with costs.

FAULKNER ET UX. v. OVERTURF.

PLEADING.—Foreclosure of Mortgage.—Recording of Mortgage.—Recorder's Certificate.—A complaint to foreclose a mortgage on real estate against the grantee of the mortgagor, which alleges that the mortgage was recorded within ninety days after its execution, but does not allege where it was

49	265
148	455
49	265
153	676

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recorded, is bad on demurrer, and its insufficiency is not cured by the memorandum or certificate of the recorder on the copy of the mortgage filed with the complaint and referred to therein, which memorandum is no part of the complaint.

From the Ripley Circuit Court.

E. P. Ferris and *S. M. Jones*, for appellants.

W. D. Ward and *J. B. Rebuck*, for appellee.

DOWNEY, J.—Six errors, in form, are assigned in this case, but only two questions are presented :

1. The sufficiency of the complaint ; and,
2. The refusal of the court to grant a new trial.

The complaint, after the caption, is as follows: Jonathan Overturf complains of Chester R. Faulkner and Sarah Faulkner, and says that on the 10th day of November, 1870, Hezekiah Murdock and Mary Jane Murdock executed a mortgage, which is filed herewith, and which mortgage was recorded within ninety days after its execution and delivery, conveying to the plaintiff the tract of land therein described as security for a debt evidenced by three notes, copies of each of which are filed herewith. The first of said notes is due and unpaid ; the second becomes due March 1st, 1874, and the third March 1st, 1875 ; that said land can not be divided, so as to be sold in parcels, without material injury to the said estate. He further says that afterwards, in 1872, the said Hezekiah Murdock sold and conveyed the said real estate to the said defendant Sarah Faulkner, and that the defendant Chester R. Faulkner is the husband of the said Sarah Faulkner. The plaintiff therefore asks judgment, etc.

The objection to the complaint, urged by counsel for the appellant, is, that it does not appear therefrom that the mortgage was recorded in the county wherein the real estate is situated, and counsel refer us to *Magee v. Sanderson*, 10 Ind. 261. In that case, the complaint alleged that the mortgage had been recorded, but failed to aver when or where it was recorded. The language of the learned judge, who delivered the opinion in that case, is as follows :

“ But there is another ground upon which the complaint is

objectionable. It does not show when or where the mortgage was recorded; and for aught that appears, it may not have been duly recorded in the county where the land is situate, and hence, not an effective lien on the property when it was conveyed to the defendant."

The action in the case under consideration, like that of *Magee v. Sanderson, supra*, is by the holder and owners of the notes and mortgage against the grantee of the mortgagor, who is not bound by the lien of the mortgage unless the mortgage was legally recorded, or he had actual notice thereof. When the action to foreclose the mortgage is by the mortgagee against the mortgagor, it need not be alleged that the mortgage was recorded; but, where the mortgage is being enforced against the grantee, in good faith and for a valuable consideration, of the mortgagor, the rule is different. 1 G. & H. 260, sec. 16. It is alleged that the mortgage was recorded "within ninety days after its execution and delivery," but where it was recorded is not shown. It is not even averred that it was properly, duly, or legally recorded, if that would be sufficient.

In our opinion, the court should have sustained the demurrer filed to the complaint. The memorandum or certificate of the recorder on the copy of the mortgage filed with the complaint is no part of the complaint, and can not cure this defect in the allegations of the complaint. *Knight v. The Flatrock, etc., Co.*, 45 Ind. 134.

The same question arises upon the evidence and the instructions of the court to the jury, and in ruling upon it the court repeated the same error.

There are other questions argued, but we do not deem it necessary to decide them.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the complaint.

Cook v. Hare et al.

COOK v. HARE ET AL.

NEW TRIAL.—Motion.—Newly-Discovered Evidence.—Where the cause assigned in a motion for a new trial is newly-discovered evidence, and it is not shown that the party making the motion had used diligence to discover the new evidence before the trial, the motion must be overruled.

From the Madison Circuit Court.

H. Craven, W. R. Pierse, and H. D. Thompson, for appellant.

M. S. Robinson and J. W. Lovett, for appellees.

BUSKIRK, C. J.—This was an action, by the appellees against the appellant, to recover the value of certain lumber sold and delivered by appellees to appellant. It originated before a justice of the peace, where the appellees had judgment for twenty-four dollars and thirty-five cents; and, on appeal to the circuit court, the appellees again had judgment for twenty-three dollars and ten cents.

The appellant has assigned for error, that the complaint does not contain facts sufficient to constitute a cause of action, and that the court erred in overruling the motion for a new trial.

The cause of action, as amended before trial in the justice's court, is unquestionably good.

The principal reason relied upon for a new trial was newly-discovered evidence. It is sufficient to say, in reference to this reason for a new trial, that no facts are stated showing that appellant had used any diligence to discover the new evidence before the trial. This is essential, as has been decided from 1 Blackford down to the present time. *Coe v. Givan*, 1 Blackf. 367; *Mason v. Palmerton*, 2 Ind. 117; *Ruger v. Bungan*, 10 Ind. 451; *Rickart v. Davis*, 42 Ind. 164; *Bartholomew v. Loy*, 44 Ind. 393.

This objection being fatal, it is not necessary to notice other questions presented by counsel for appellee.

The cause has been twice tried, with the same result. We

Rose *et al.* v. Duncan *et al.*

have examined the evidence, and think it fully supports the judgment.

The judgment is affirmed, with costs.

ROSE ET AL. v. DUNCAN ET AL.

TENDER.—*Conditional Tender.*—A tender of payment made by the maker of a promissory note, on condition that the holder will dismiss an action against the maker in no way connected with the note, is bad.

SAME.—A tender of payment of less than the amount due is bad.

From the Morgan Common Pleas.

W. R. Harrison and *W. S. Shirley*, for appellants.

C. F. McNutt and *G. W. Grubbs*, for appellees.

WORDEN J.—This was an action by the appellant Aaron Rose, assignee of James R. Long, against John C. Duncan, James Martin, James J. Maxwell, and Presley Johnson, as the makers of a promissory note, whereby the defendants promised to pay to the plaintiff, nine months after the date thereof, at the First National Bank of Martinsville, Indiana, the sum of twenty-four hundred and seventy-six dollars and sixty-nine cents, with ten per cent. interest, and attorney's fees if suit should be instituted thereon, bearing date March 3d, 1871. Before final judgment, other parties than Rose were permitted to be made plaintiffs also; but as no error is assigned in respect to this proceeding by the appellees, against whom final judgment was rendered, we need not notice it further.

Issue, trial by the court, finding and judgment for the plaintiffs, but for less than was due upon the note, in this, that no interest was allowed after December 19th, 1871, the case having been tried and the judgment rendered in October, 1872. The plaintiff moved for a new trial upon this, amongst other grounds, but the motion was overruled, and an exception taken.

Rose et al. v. Duncan et al.

The following are the facts in the case, as we gather them from the record :

Aaron Rose, as assignee of James R. Long, sold certain lands to Mrs. Sarah J. Duncan, who was at the time under coverture. He conveyed the land to her by deed, and the note in suit was executed for the purchase-money, said John C. Duncan, one of the makers, being the husband of Sarah J. Before the note in suit matured, Rose instituted an action and proceeding in attachment, in the Morgan Circuit Court, against the husband, John C., upon an alleged claim against him in no way connected with the purchase by Mrs. Duncan of the land, nor growing out of her indebtedness for the land. He caused the attachment to be levied upon the land, which he had thus sold and conveyed to Mrs. Duncan. Soon after the note matured, perhaps about December 19th, 1871, Mrs. Duncan caused a tender to be made to Rose of the amount due on the note, upon condition that he would release the land from the attachment ; but Rose declined to receive the money upon this condition. She then caused the money to be deposited in the First National Bank of Martinsville, and, when this was done, the plaintiff Rose caused the bank to be garnished, in his action against John C. Duncan. The action of Rose against John C. Duncan was finally defeated, and judgment was rendered for the defendant therein. After that action was thus terminated, Mrs. Duncan again offered to pay the note in suit, without interest, etc.

These are the material facts, and, in our opinion, they furnish no legal reason why the note should not be paid according to the terms thereof, including interest.

The first tender was made only on condition that Rose would release the land from attachment. But he was entitled to be paid without thus releasing the land. If the proceedings in attachment had been well founded, and if the land was subject to the attachment, on the ground that Duncan was the real purchaser, and that he had procured it to be conveyed to his wife in order to defraud his creditors, and if Rose had succeeded in his suit against Duncan, we do not see how these matters could have been any defence to the payment of the

Railsback v. Greve *et al.*

note in suit, especially if Rose himself was guilty of no fraud. On the other hand, the prosecution of an unfounded action by Rose against Duncan and the attachment of the land as the property of Duncan can be no defence to the note in suit. When the note matured, therefore, Rose was entitled to payment without releasing his attachment, which he had a right to prosecute to final judgment ; and the conditional tender was ineffectual to stop the accruing of interest. The subsequent tender was insufficient, because the amount tendered was less than the amount due upon the note—it did not include interest.

We do not see as the garnishment of the bank has any influence upon the case.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

RAILSBACK v. GREVE ET AL.

PLEADING.—*Suit on Appeal Bond.*—A complaint against the surety on a bond for an appeal to the Supreme Court, which does not show when the judgment appealed from was affirmed by the Supreme Court, or when the opinion and judgment of affirmance were filed in the office of the clerk of the lower court, is bad on demurrer.

From the Wayne Circuit Court.

C. H. Burchenal, for appellant.

J. B. Julian and *J. F. Julian*, for appellees.

PETTIT, J.—This suit was brought by the appellees, Henry Greve, Julius Eschman, and William Buhrlage, against Jason Ham and Joel Railsback, on a bond for an appeal to this court from a judgment in favor of the appellees against Ham, Railsback being surety on the bond. Ham died after the commencement of the suit, and before any action was had in court, and the suit was prosecuted against Railsback, the surety on the bond.

Willey v. Koons, Treasurer.

The defendant demurred to the complaint for want of sufficient facts, which demurrer was overruled. This ruling is assigned for error.

The objections to the complaint are, that it does not show when the judgment was affirmed in the Supreme Court, or when, if ever, the opinion and judgment of affirmance were filed in the office of the clerk of the court below. For anything that appears in the complaint, the judgment might have been affirmed on the same, or the day before this suit was brought on the appeal bond. There was no right to proceed to collect or demand payment of the affirmed judgment until after the sixty days given for filing a petition for a rehearing had expired, and a certified copy of the opinion and judgment of affirmance had been filed in the office of the clerk of the court below. Rule 25 of this court ; 2 G. & H. 276, sec. 571 ; 2 G. & H. 272, sec. 2 ; *Poppenhusen v. Seeley*, 41 Barb. 450.

The demurrer to the complaint should have been sustained. We will notice no other alleged errors, because they might not have occurred if the ruling on the demurrer to the complaint had been correct. The complaint is the foundation of the action, and if it is valueless the superstructure built on it must fail.

The judgment is reversed, at the costs of the appellees, with instructions to the court below to sustain the demurrer to the complaint, and for further proceedings.

WILLEY v. KOONS, TREASURER.

TAX.—*Purchaser of Land Belonging to Congressional Township Fund.*—Prior to the passage of the act of December 21st, 1872, Acts 1872, p. 57, the purchaser of land belonging to the congressional township fund was not, under

Willey v. Koons, Treasurer.

the sixth clause of section 6, 1 G. & H. 70, liable for taxes assessed upon said land before it had been conveyed to him.

From the Clark Circuit Court.

M. C. Hester, for appellant.

DOWNEY, J.—Suit by appellant against appellee. On demurrer to the complaint, it was held bad, and this ruling is the error assigned.

Counsel for the appellant states the facts and the question arising thereon as follows: “The facts averred in the complaint are briefly these: In 1870, certain real estate belonging to the congressional township fund, and situated in both Clark and Washington counties, was offered for sale, in compliance with the requirements of the statute, by the auditor of Washington county, and was purchased at said sale by appellant; appellant has made his payments thereon as the statute provides, but has not made full payment therefor, and has not received a deed for the land. Notwithstanding this, the auditor of Clark county has placed on his tax duplicate so much of the said land as lies in Clark county, and has assessed the same for taxation against the appellant. The appellee, as treasurer of Clark county, is now threatening to collect the said taxes by distress and sale of appellant’s personal property. Appellant prays that the appellee be enjoined from the collection of the said taxes from appellant.

“Is the purchaser of land belonging to the congressional township fund liable for taxes assessed upon such land before it has been conveyed to him? This is the question presented by the demurrer to the complaint. The circuit court held the affirmative of this question to be the law. The appellant claims that in this ruling the circuit court was in error.”

There is no brief for appellee.

The appellant urges that he is not bound to list the lands and pay taxes thereon, because he is not the owner thereof, as he must be by 1 G. & H. 70, sec. 10. Counsel for appellant says,

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that the appellee claims that the land is taxable by the eighth section of the same act.

The tenth section reads as follows: "Every person of full age and sound mind, not a married woman, shall list the real and personal property, subject to taxation, of which he is the owner, situate or being in the county in which he resides," etc.

The eighth section reads thus: "Lands sold by the State, including lands forfeited to the sinking fund, university fund, and all other trust funds, though not granted or conveyed, shall be assessed in the same manner as if actually conveyed."

In the sixth section of the act, among the lands exempt from taxation, are "all lands granted for the use of common schools, so long as the same shall remain unsold."

Lands belonging to the congressional township fund are not sold by the State, and do not fall within the provisions of the eighth section. They are sold, according to the statute (1 G. & H. 548, *et seq.*), by the county officers. According to this statute, the purchaser only acquires the title and becomes, in a legal sense, the owner of the land when he has paid all the purchase-money, and received a deed. Sec. 55, p. 551.

As a general rule, the statute looks to the legal owner as the party by whom the lands in the State are to be listed, and to whom they are to be charged for taxation. *Overstreet v. Dobson*, 28 Ind. 256.

The clause of the sixth section which we have quoted, exempts these lands from taxation until they shall be sold, and by that, we think, is meant until they are conveyed.

Looking to the act of December 21st, 1872, Acts 1872, p. 57, which was not in force so as to affect the question involved in this case, we find that sec. 9 of that act is the same as sec. 8 above quoted; and yet, by the twenty-first section of that act, it is provided as follows: "When real estate is exempt in the hands of the holder of the fee, and the same is contracted to be sold, the amount paid thereon by the purchaser, with the enhanced value of the investment and improvement thereon until the fee is conveyed, shall be held to be personal

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property, and listed and assessed as such, in the place where the land is situated.”

It seems probable that this section was intended to cover cases, like the one under consideration, which were found not to have been provided for in the former law.

We think the court erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings.

LANE v. ALBRIGHT.

PRINCIPAL AND AGENT.—*Agent for Sale of Real Estate.*—*Right to Commission.*—

Where the owner of real estate agreed with a real estate broker that he would pay him a certain amount if he would find a purchaser within a reasonable time, who would pay a certain price for his real estate, if within such time the broker procured such purchaser, he was entitled to recover his commission, though the owner of the real estate sold the same before the broker found the purchaser.

From the Howard Circuit Court.

M. Bell and *A. S. Bell*, for appellant.

J. O'Brien, for appellee.

BUSKIRK, C. J.—This was an action by appellant against appellee, for services rendered under a special contract between them in reference to the sale of certain real estate.

Issue, trial by a jury, verdict for appellee, and, over motion for a new trial, judgment on the verdict.

The appellant has assigned for error the overruling of the motion for a new trial.

The material facts are these: The appellee owned one hundred and sixty acres of land near the city of Kokomo, Indiana, which he had been offering for sale for several years.

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The appellant was a real estate agent in said city, and on the 12th day of February, 1873, wrote to the appellee at Delaware, Ohio, where he resided, proposing to sell the land for him on commission. The letter was forwarded to Madison, New Jersey, where the appellee was looking after a sick son. The appellee, on the 27th of February, 1873, wrote to appellant from Madison, New Jersey, in which he acknowledged the reception of appellant's letter of the 12th of said month, and, after speaking of family matters, he made the following proposition :

"Since here I refused fifty dollars per acre for my land. I hold it at fifty-five dollars per acre. If you can find a man who will pay fifty-five dollars per acre, one-half down, I will pay you two hundred dollars, if you let me know soon. I hope to be in Del. next week.

"Yours truly,

J. S. ALBRIGHT."

Upon the receipt of this letter, appellant advertised the land for sale in the city papers, and conversed with various persons in reference to the land, and tried to procure a purchaser. On the 20th of March, 1873, appellee went to Kokomo and went home with appellant and took dinner with him. They had a conversation about the sale of the land, in which appellant informed appellee what he had done, and that he had a prospect of finding a purchaser. Appellee did not inform appellant that he had sold the land, or had any immediate prospect of selling the same. About four o'clock P. M. of said day, Marts and Hocker made to appellant a written proposition to purchase said land at fifty-five dollars per acre, one-half cash and the balance in one and two years, with six per cent. interest.

The case made by appellee was this: On the 17th day of February, 1873, L. A. Leach, of the city of Kokomo, wrote to appellee proposing to purchase the land in question, and asking the price and terms. This letter was received by appellee at Madison, New Jersey, and on the same day he wrote to appellant he wrote to Leach to the effect that he had refused fifty dollars per acre for his land since he had been

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there ; that he had offered to another man at fifty-five dollars per acre, and if he did not take it might rest a time. On the 7th of March, 1873, Leach wrote appellant acknowledging receipt of his letter, and asking the smallest sum he would take, he paying three thousand cash and balance in one and two years, with ten per cent. interest. On the 13th of March, 1873, appellee wrote to Leach that his real price was fifty-five dollars, but as he would have to pay a comission he might have it for fifty-three dollars per acre, three thousand cash and balance in one and two years, with ten per cent. interest per annum, payable annually, appellee to pay taxes and have the crop for that year. On the 15th of March Leach wrote appellee, accepting his proposition, but appellee did not receive this letter before his departure for Kokomo. Leach and appellee met in Kokomo on the morning of the 21st of March, 1873, when Leach informed him that he had written him, accepting his proposition. On the morning of said day, and before he met appellee, Leach went to the office of appellant and informed him of his correspondence with appellee, and that he had written him accepting his proposition, and he believed appellee was trying to dodge him. The trade between Leach and appellee was closed in the forenoon of said day. The deed was made a little before or after twelve M. of said day. Leach testified that appellant had not been instrumental in bringing about his contract with appellee. Leach also testified that appellee said, during the time they were closing up the trade, that he expected appellant would expect a commission, and if he did, that he (Leach) would have to pay it as he had put the price of the land down ; but Leach did not agree to pay it.

Upon this evidence, the court instructed the jury as follows :
“ 1. By the second paragraph of the complaint, the plaintiff seeks to recover upon a contract which he alleges was made by him with the defendant, by which he avers it was agreed that the defendant was to pay him the sum of two hundred dollars if the plaintiff would furnish a purchaser for his, defendant's, real estate in Howard county, Indiana, at the

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price of fifty-five dollars per acre, one-half cash down, and let the defendant know thereof soon. The plaintiff further avers that he did, within twenty days from that time, find responsible persons ready and willing to take the land upon these terms, and that said parties, to wit, Marts and Hocker, entered into a written agreement with the said plaintiff for the purchase of said land, and that said defendant was duly notified thereof. If these facts be established by a preponderance of the evidence, you should find for the plaintiff, upon the second paragraph of the complaint, unless the evidence shows that defendant had sold the land before the plaintiff did; in which event the plaintiff would not be entitled to recover, unless it is shown that there was a contract between the parties plaintiff and defendant, that defendant was not to sell the land, or if he did, that he was to pay the plaintiff the amount agreed upon as though he had made the sale himself.

“2. If the material averments in the second paragraph of the complaint are not established by a preponderance of the evidence, you should find for the defendant. The burden of the proof is upon the defendant to show that he made a sale of the land before the plaintiff did. If that is established, the burden of the proof is upon the plaintiff to show that he was to have compensation if the defendant made the sale, or that by contract the defendant had no right to make a sale.”

In both of the instructions, the jury were directed that the plaintiff could not recover, unless they were satisfied from the evidence that he had made a sale of the land before the defendant had sold it. This was making a new contract for the parties. The appellee had obligated himself to pay appellant two hundred dollars, if he could, within a reasonable time, find a man who would purchase the land at fifty-five dollars per acre. The appellant accepted the proposition, and advertised the land for sale. He conversed with various persons in reference to the land. He induced two persons to purchase the land at the price and upon the terms named. The proposition was made on the 27th day of February, 1873, and

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the appellant found purchasers on the 21st of March of the same year. This was within a reasonable time. The appellant performed all that he was required by the contract to do, and was prevented by the appellee from selling the land. The appellee disabled himself from carrying out the contract of sale made by appellant. The fact that the appellee had authorized the appellant to sell his land did not deprive himself of the power of selling it, but he could not thereby avoid his liability to appellant.

In *Hawley v. Smith*, 45 Ind. 183, it was held, upon full consideration, that the rule is, that when the performance by one party is prevented by the act of the other, the party not in fault should recover in damages such sum as will fully compensate him for the injury which he has sustained by reason of the non-performance of the contract. This principle is directly in point here. The two cases are, in many respects, alike. The appellant seems to have acted in perfect good faith, while it seems that the appellee sold his land at a reduced price, to avoid the payment to the appellant of the sum agreed upon. The appellee cannot thus avoid the obligation of his contract. He made his proposition broad and comprehensive, and imposed no conditions. He might have provided that if he effected a sale of the land before the appellant found a purchaser, he was not to pay him the sum agreed upon. Having failed to do so or impose any other conditions, the courts cannot make a new contract for him or impose conditions not imposed by himself, but must determine the rights of the parties under the contract as made by them.

The judgment is reversed, with costs; and the cause is remanded, with directions for a new trial in accordance with this opinion.

Martin, Guardian, v. Beasley.

MARTIN, GUARDIAN, v. BEASLEY.

49	280
127	406
127	455
49	280
128	363

49	280
154	420

GUARDIAN AND WARD.—*Order Against Guardian Without Notice.*—An order made by a court without notice to a guardian, requiring him to pay a debt claimed to be due from him or his ward, as to pay taxes on land of his ward's ancestor, sold by the administrator of the said ancestor's estate, is void.

SAME.—*Summary Proceeding.*—Upon failure of the guardian to comply with such an order, a citation to him to appear *instantly* and render an account of his proceedings in the guardianship is illegal and unprecedented.

EXECUTOR AND ADMINISTRATOR.—*Sale of Real Estate.*—*Incumbrances.*—When a court orders the sale of real estate by an executor or administrator, unless otherwise ordered by the court, he sells and conveys the land subject to all incumbrances.

From the Spencer Circuit Court.

C. L. Wedding and *R. G. Evans*, for appellants.

L. Q. DeBruler and *C. A. DeBruler*, for appellee.

DOWNEY, J.—The record in this case shows that James H. Martin died the owner of certain real estate; that the same was sold by the administrator of his estate, and purchased by the appellee.

Martin, the appellant, was the guardian of the children of the deceased. Without any notice to him, at the April term, 1874, the court ordered that he pay to the county treasurer the taxes on the land, sixty-five dollars and seventy-eight cents, take his receipt therefor, and file it as a voucher. At the August term, 1874, Beasley filed a written motion, representing that he had paid the purchase-money for the land; that at the time he purchased it, the land, there were delinquent taxes, state and county, on the land so bought by him, to the above amount; that he had obtained the said order at the former term, setting it out; that the guardian refused to pay the amount and had not done so; and praying that the guardian "be called upon by the court and required to comply with its order." Thereupon a citation issued against the guardian to appear in court *instantly*, to render an account of his proceedings in the guardianship. The guardian, thus hurried into court, made

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an answer under oath, most of which was immaterial, but alleging, among other things, that the order was made in his absence and without any notice to him, and he had no opportunity to resist the same; denied that there was the amount of taxes mentioned due upon the said real estate; and that, as the sale was a judicial sale, the said Beasley took the land subject to the taxes.

The court, on this showing, made an order reciting the making of the first order; that the guardian had responded to the citation, denying the validity of the first order, and refusing to comply with the same; alleging that it appeared from the reports of the guardian theretofore made, that he had funds in his hands as such guardian with which to comply with the order, and requiring the guardian to comply with the order before twelve o'clock of the next Saturday (the day of the week on which this order was made does not appear), and in default of so doing that he be removed. The record recites that the guardian did not comply with the order within the time allowed him, and that he was accordingly removed, and his letters of guardianship set aside; and that he should forthwith account for and pay over to the clerk, or to his successor in the guardianship, all money or property in his hands, and that he pay the costs of the proceeding.

To all of these orders, except the first, the guardian excepted, and now alleges that they are erroneous.

The first order made by the court, without notice to the guardian, was void, and could not be a legal foundation for any subsequent proceedings. Guardians are not liable to be proceeded against in any such way. There is no law or practice authorizing this summary proceeding against a guardian, to compel him to pay debts claimed to be due from him or from his wards.

The subsequent order of the court, requiring the guardian to come into court *instanter*, and render an account, etc., was illegal and unprecedented. There were no circumstances shown to warrant any such unusual haste and apparent disregard of the rights of the guardian and his wards.

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Nothing is shown to fix upon them any liability to pay the alleged delinquent taxes.

When the court orders the sale of real estate by an executor or administrator for the payment of liens thereon, the money may be so applied by the executor or administrator, under the direction of the court. 2 G. & H. 512, sec. 89. But when the land is sold subject to the liens, the purchaser must pay them himself. 2 G. & H. 512, sec. 89; *Foltz v. Peters*, 16 Ind. 244; *Clarke v. Henshaw*, 30 Ind. 144.

There is no warranty in such sales or in the conveyance usually made by an executor or administrator. Unless otherwise ordered by the court, they sell and convey the land subject to all incumbrances.

In our opinion, the whole proceeding, from the beginning, is erroneous, and all the orders made should be reversed.

The orders of the court are reversed, with costs, and the cause remanded, with instructions to dismiss the proceedings.

THE STATE v. ELFF.

LIQUOR LAW.—*Act of 1875.—Proviso of Seventeenth Section.*—By the seventeenth section of the liquor law of March 17th, 1875, it is provided, "that no prosecution shall be instituted or maintained against any person for any violation of the provisions of this act occurring between the time when it shall take effect and the close of the first regular session of the board of commissioners of the proper county, the beginning of which session not taking place in less time than four weeks after this act shall have taken effect."

Held, that, if this proviso be void, there is no valid law making the selling, within the time excepted by the proviso, of intoxicating liquor in a less quantity than a quart at a time, without a license, to be drunk at the place where sold, an offence; so that, whether it be valid or void, an indictment for so selling on the 6th of April, 1875, was properly quashed.

From the Marion Criminal Circuit Court.

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O. A. Buskirk, Attorney General, and *J. M. Cropsey*, Prosecuting Attorney, for the State.

N. B. Taylor, *F. Rand*, and *E. Taylor*, for appellee.

WORDEN, J.—This was an indictment charging the appellee with having, on the 6th of April, 1875, at said county of Marion, sold two gills of intoxicating liquor to a person named, to be drunk at the place where sold, without a license, etc.

The indictment, on motion of the defendant, was quashed. The State excepted, and appeals to this court.

The act of March 17th, 1875, repeals all former laws regulating the sale of intoxicating liquors, hence, if the act charged is criminal, it is because it is made so by the statute of 1875. By the seventeenth section of the latter statute, it is provided, "that no prosecution shall be instituted or maintained against any person for any violation of the provisions of this act occurring between the time when it shall take effect and the close of the first regular session of the board of commissioners of the proper county, the beginning of which session not taking place in less time than four weeks after this act shall have taken effect." Acts Spec. Ses. 1875, p. 58.

The act of 1875 took effect from and after its passage. The alleged time of the offence will be taken, *prima facie*, to be the true time. Hence, it appears that the supposed offence was committed after the last named act took effect. The regular sessions of the boards of commissioners are held on the first Mondays of March, June, September, and December annually. Acts 1861, p. 67. Hence, also, it appears that the supposed offence was committed before the lapse of time contemplated by the proviso above set out in the act of 1875.

But it is insisted by counsel for the State, that the proviso is in conflict with and violation of three different provisions of the constitution of the State, which are pointed out and designated in the brief of counsel. We do not deem it necessary or hardly proper to express any opinion upon this question, in this case, for the reason that, if the position of counsel for the State be well taken, she can derive no benefit from it. The proviso is a part of the enactment, so qualifying the body

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of the act that, if it must fall as being unconstitutional, the enactment prohibiting a sale without license must also fall. There would then be no foundation whatever for the prosecution. The purpose of the proviso was to give persons an opportunity to procure the required license before penalties should attach for selling without license. If the proviso were to be struck out as unconstitutional, the part of the act prohibiting sales without license could not have the force of law, because it would not, as thus modified, be an expression of the legislative will. The enactment, without the proviso, has not the sanction of legislative authority. It is very apparent that the legislature did not intend to make it an offence to sell without license until parties had had the provided opportunity to procure it; and the courts cannot, by holding a part of the enactment invalid, make that an offence which otherwise would not be. We quote a paragraph from the opinion of this court in the case of *Meshmeier v. The State*, 11 Ind. 482, 486, involving a similar question:

“The legislature pass an entire statute, on the supposition, of course, that it is all valid, and to take effect. The courts find some of its essential elements in conflict with the constitution, strip it of those elements, and leave the remaining portion, mutilated and transformed into a different thing from what it was when it left the hands of the legislature. The statute thus emasculated is not the creature of the legislature; and it would be an act of legislation on the part of the courts, to put it in force. The courts have no right thus to usurp the province of the legislature.”

The prohibition can be enforced only with the limitations prescribed by the legislature. If the proviso in question is valid, the prosecution cannot be maintained. If, on the other hand, the proviso is void, there is no valid law making the facts charged an offence. In either event, the court did right in quashing the indictment.

The judgment below is affirmed.

SCHAUM ET AL. v. SHOWERS.

49	285
148	434

COUNTY TREASURER.—*Taxes Unpaid Standing Charged against Treasurer on Final Settlement.*—*Statute.*—*Lien.*—Section 193, 1 G. & H. 113, provides, that “if any county treasurer, on making settlement with the county auditor, shall stand charged with any tax remaining unpaid, and shall not receive a credit therefor in such settlement, such treasurer may collect such tax for his own use, at any time within one year after such settlement, either by distress and sale, as hereinbefore provided, or by action of debt in his own name, before any justice of the peace, or court having jurisdiction.” *Held*, in an action, based on this section, against the owner of the property against which the taxes in question were assessed, and the mortgagee of certain real estate constituting a part thereof, that a lien could not be declared upon such real estate for the amount of said taxes.

From the Posey Circuit Court.

A. Iglehart and J. E. Iglehart, for appellants.

E. M. Spencer and W. Loudon, for appellee.

BUSKIRK, C. J.—Showers sued Schaum and Muenchoff, alleging that on the 1st of April, 1872, and thence till 1873, he was treasurer of Posey county; that while he was such treasurer there was assessed against the property in the complaint described, upon which there was located a mill and distillery, and against other real and personal property belonging to “the firm of George Wolflin & Co., the sum of four hundred and ten dollars and fifty cents,” and that the defendants, Herman and Ferdinand Muenchoff, are the surviving partners of said firm, George Wolflin having died in October, 1873; that while the plaintiff was treasurer, at the request of Wolflin, he took out a receipt for said taxes, and charged himself with the amount thereof, four hundred and ten dollars and fifty cents; that no part of said sum has been paid, but the same is due; that said plaintiff made his final settlement with said county as treasurer, in June, 1873, and did not at that or any other time receive any credit therefor; that said Charles and Herman Schaum hold a mortgage upon the said real estate to secure the payment of ten thousand dollars; prayer for judgment against Muenchoff for four hundred and ten dollars and

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fifty cents, that the same might be declared a lien upon the real estate prior to the mortgage of Schaum & Schaum, and in default of the payment of the same, an order for the sale of said real estate in satisfaction of the same.

A demurrer to this complaint, for want of sufficient facts, was filed by Charles Schaum and Herman Schaum, the mortgagees, and overruled, and they excepted; and said defendants declining to answer further, and the others being defaulted, the court found that the plaintiff's claim was a lien upon the property mentioned in the complaint prior to the mortgage of said Charles Schaum and Herman Schaum, to which finding said Charles and Herman duly excepted; and thereupon the court rendered a personal judgment against said Ferdinand and Herman Muenchoff for four hundred and sixty dollars.

The court also entered a decree directing that in default of the payment of said sum, with costs, the lands should be sold to satisfy the lien, to which decree Charles and Herman Schaum duly excepted, and prayed an appeal.

The errors assigned are :

1. The overruling of the demurrer to the complaint.
2. The finding that the claim of the appellee is a lien on the land prior to the appellants' mortgage.
3. The final decree of the court directing the sale of the land for the satisfaction of the claim of appellee.

The co-defendants have been notified, and are in court, in accordance with sec. 551 of the code.

The action is based upon section 193 of the act providing for the assessment of taxes, etc. 1 G. & H. 113. This section provides, that "if any county treasurer, on making settlement with the county auditor, shall stand charged with any tax remaining unpaid, and shall not receive a credit therefor in such settlement, such treasurer may collect such tax for his own use, at any time within one year after such settlement, either by distress and sale, as hereinbefore provided, or by action of debt in his own name, before any justice of the peace, or court having jurisdiction."

Two questions are presented by the record :

1. Do the allegations in the complaint bring the case within the statute?

2. If the case is within the statute, can the treasurer enforce his lien by action?

We will consider these points in their order. The statute requires:

First. That on making settlement with the auditor the treasurer must stand charged with the tax.

Second. He must not have received a credit in such settlement.

Third. Such action must be brought within a year from such settlement.

It is insisted that the complaint is defective. It is averred that when the treasurer took out a receipt he charged himself with the amount of such taxes; that he made his final settlement with said Posey county, as treasurer thereof, on the — day of June, 1873, and did not, at that time or at any other time, ever receive any credit therefor. It is claimed that it does not appear from the complaint that the action was brought within the time limited by the statute. The action must be brought within one year after the settlement, not after the payment, as contended by counsel for appellants. The settlement was made in June, 1873, and the action was commenced on the 12th day of March, 1874, which was within the time limited.

Another objection is urged to the complaint, which we will state in the language of counsel for appellants:

“But, second, we insist that the statute does not justify the remedy adopted by the appellee, and enforced by the court.

“The proposition is, we think, too elementary to admit of one moment’s question, or to require the citation of any authority, that when a new remedy is given by statute, the remedy pointed out must be strictly pursued, and cannot be enlarged.

“It is insisted by the appellees that inasmuch as there was a lien upon the real estate for the payment of the taxes, which could have been enforced by sale under the ordinary publication under the tax laws, and inasmuch as the statute gives him

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a remedy by action, he may resort to the remedy by action to enforce the lien. But surely this is neither good law nor logic. The real question presented is, could the appellee while treasurer, and before he paid the tax, enforce the lien thereof upon the land by suit? If he could have done so, he may maintain this action, but if not he must fail here, for surely the statute does not confer the power. For it cannot be said that the power to collect a tax by action of debt confers power to enforce a lien by action; because there happens to be a lien, for the enforcement of which a specific remedy by distress and sale is pointed out by statute.

“The section of the statute providing a remedy, whereby a treasurer who by any means becomes a creditor of the tax-payer may secure himself against loss, while it is in one sense remedial, still belongs to that class in which all statutes for the enforcement of the payment of taxes are classed, and must be strictly construed.

“But strict construction is not necessary to sustain this appeal. All that is necessary is, not to extend the terms of the statute, but to give it all the force the terms justify, without any unnatural implications.

“The evil was, that if a treasurer by any means satisfied a tax and charged himself with it, the right to collect by distress and sale was gone, and he had no right of action against the tax-payer, unless there was such a state of facts as should raise an assumpsit. To obviate this evil, this section of the statute simply preserved the remedy by distress and sale in all cases where the treasurer had by any means become charged, and had not been paid. This was proper, preserving the rights of the tax-payer and the treasurer. This remedy, however, might not be efficient, as there might not be any property in the county on which he could seize to make his money, and so the section gives a remedy by ‘action of debt.’ Hence, under the section where the treasurer could proceed *in rem* against the tax-payer’s property, he must distrain and sell as directed by the general provision of the statute. But when he proceeds by

suit, he can only proceed by action *in personam* against the tax-payer.

“The appellee may object that this construction is technical and literal, but we answer, that it is in consonance with the spirit and manifest intention of the section, and we might content ourselves with the simple statement, *ita est lex.*”

The above quoted section gave the appellee two remedies. The one was by the distress and sale of the goods of the persons for whom he had paid the taxes. This remedy he did not pursue. The other was by an action of debt. We think that when the appellee receipted for the taxes, and charged himself with the amount, the lien on the land was discharged. This is made to appear in two ways; first, by limiting the first remedy to the distress and sale of the goods of the owner of the land. If the purpose had been to retain the lien upon the land, it would have authorized its sale as other lands are sold for non-payment of taxes.

In the second place, the second remedy is by an action of debt. There is nothing said about the enforcement of a lien. We think it authorizes a personal judgment, and nothing more. The case of *Bright v. Markle*, 17 Ind. 308, tends to confirm us in such conviction. There, it was said: “Jacob Markle was treasurer of Jasper county, Indiana, and alleges that he charged himself with taxes due from Bright and Dunn, and settled with the auditor for them. He now sues Bright and Dunn in an ordinary civil action for the amount, as for money paid to their use.” This being a new and extraordinary remedy, it should be strictly pursued, and should not be extended beyond the plain meaning of the language used.

Having reached the conclusion that the lien upon the land was extinguished, it remains to inquire whether there is any personal liability against appellants, upon the ground that they are mortgagees of the land in question, and the payment of the taxes inured to their benefit.

The nineteenth section of the assessment law, 1 G. & H. 72, provides, that “in cases of mortgaged real estate, the mortgagor

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shall, for the purposes of taxation, be deemed the owner until the mortgagee shall have taken possession of the mortgaged premises, after which the mortgagee shall be deemed the owner." See *Bodertha v. Spencer*, 40 Ind. 353; *Isaacs v. Decker*, 41 Ind. 410.

The evidence is not in the record, and we are not advised whether the mortgagees have taken possession or not.

We have thus far considered the case as it was affected by sec. 193, above quoted.

It seems that the appellee has another remedy than that given by the above quoted section. Section 105 of the assessment law, 1 G. & H. 98, provides, that "whenever any county treasurer or collector for any previous year shall have charged himself with, and accounted for, any tax that shall not have been paid to him, such tax shall be deemed and taken as due him personally, whether in or out of office, and may be by him collected in the same way as other taxes due and unpaid are collected."

By the above section, the treasurer is subrogated to the right of the State and county. The question, however, is not before us, and we do not decide whether the facts of the case bring it within the above section.

The above section cannot apply to this action, as it is based upon that clause of section 193 which gives an action of debt. Section 105 constitutes section 162 of the present assessment law. See Acts 1872, p. 57.

The judgment against appellants is reversed, with costs; and the cause is remanded for a new trial, in accordance with this opinion.

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LEACH ET AL. v. RHODES, ADM'R.

PLEADING.—Consideration.—In a pleading founded upon a contract, the consideration must be stated as well as the promise, except when the pleading is upon a deed, bill of exchange, promissory note, or other instrument in writing which imports a consideration; and in alleging the consideration, it is not sufficient to say that the promise was made for a full and valuable consideration, but particular facts, legally sufficient to support the promise, must be stated.

SAME.—A complaint by the assignee against the assignor of a promissory note, upon a parol agreement that the latter would guarantee the prompt payment of the note, and that he would collect the note and pay the amount over to the plaintiff, if not paid by the maker, did not allege a consideration for such promise.

Held, that the complaint was insufficient.

From the Howard Common Pleas.

J. W. Robinson and *N. R. Lindsay*, for appellants.

M. Garrigus, for appellee.

DOWNEY, J.—This was a claim filed by the appellants against the appellee. It was in the form of a regular complaint. In it the claim is stated, in substance, as follows: That the deceased held two promissory notes against Thomas H. Ellison, secured by a mortgage on an interest in a grist-mill and small piece of land; that the deceased sold and delivered the notes to the plaintiffs "for a full and valuable consideration," and agreed and guaranteed the prompt payment of the same, and that he would collect the notes and pay the amount over to the plaintiffs, if not paid by the maker. It is then averred that the deceased instituted an action on the notes and mortgage, and recovered a judgment against Ellison for the amount of the notes and for a foreclosure of the mortgage; that the mortgaged premises were sold and purchased by the plaintiff Moore, who paid therefor forty dollars, thirty-one dollars of which went to pay the costs in the action; that Moore sold the land, so purchased by him, at private sale for one hundred dollars, which sum was credited on the debt; that Ellison is insolvent; that the balance due of the debt is four

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hundred and sixty-two dollars and interest, which remains unpaid, etc.

Answer in ten paragraphs. Demurrers filed to all of the paragraphs, except the first, which was the general denial. Demurrers sustained to all the paragraphs except the fifth, eighth, ninth, and tenth, to which the demurrers were overruled. Issues were formed, and there was a trial by the court, finding for the defendant, motion for a new trial overruled, and judgment for the defendant.

The overruling of the demurrers to the fifth, eighth, ninth, and tenth paragraphs of the answer is the first alleged error.

We think there was no error in this ruling, because we think the complaint is substantially defective. To constitute a valid contract, there must be a consideration. In stating a contract in a pleading, the consideration must be stated, as well as the promise, in every case except where the pleading is upon a deed, bill of exchange, promissory note, or other instrument in writing which imports a consideration. In this case, the action is not upon the notes which were sold by the deceased to the plaintiffs, nor upon any indorsement of them, nor any other instrument in writing importing a consideration. But it is upon a parol or oral contract. It was necessary, therefore, to state a consideration for the promise of the deceased. In alleging a consideration, the particular facts must be stated. It will not do to say, "for a full and valuable consideration" the deceased promised, etc. The code has not changed this rule of pleading in those cases in which it is necessary to allege a consideration. It is a conclusion of law to allege that there was a full and valuable consideration, without stating the particular facts. It is for the court, and not the pleader, to decide whether or not the facts stated show a consideration. *Brush v. Raney*, 34 Ind. 416.

"The consideration must either appear impliedly from the instrument itself, as a promissory note or bill of exchange, or the complaint must expressly state the particular consideration on which the contract is founded. And it is essential that the consideration stated should be legally sufficient to support the

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promise for the breach of which the action is brought." Moak's Van Santvoord Pleadings, 217, star paging. See, also, 1 Chitty Pl. 292, *et seq.*; 1 Saunders Pl. & Ev. 187, *et seq.*

These authorities point out the difference between executed and executory considerations, and give the rules for alleging each. But we need not consider the subject in its details, as, in this case, no attempt is made to state the nature and particulars of the consideration, or to show whether it was of the one kind or the other. We need not examine any other questions made in the case.

The judgment is affirmed, with costs.

TERRY v. DEITZ ET AL.

NEW TRIAL.—*Motion.—Exclusion of Evidence.*—That "the court erred, on the trial of the cause, in excluding evidence offered by the plaintiff, to the exclusion of which the plaintiff excepted at the time," is too indefinite as a statement of a cause in a motion for a new trial.

PROCEEDING SUPPLEMENTARY TO EXECUTION.—*Special Deposit.*—A. delivered to B. a certain sum of money, on an express agreement that it was to be placed by B. in the hands of the clerk of the circuit court as a special deposit for the use of C., and for the sole purpose of redeeming certain land sold to C. under a decree of foreclosure against B., and that the ownership of the money was not to pass from A. unless it was used in such redemption, in which case A. was to have a mortgage on the land. The money was accordingly tendered to C., who refused to accept it, and it was then placed in the hands of said clerk for said purpose. In a proceeding supplementary to execution brought by D., an execution creditor of B., against B. and said clerk, to subject said money still in the clerk's hands to D.'s execution, it did not appear what right B. had to redeem, or whether such right had been judicially determined.

Held, that until B.'s right of redemption should be determined, the money could not be taken from the clerk to be applied upon D.'s execution.

From the Franklin Circuit Court.

C. C. Binkley and G. Holland, for appellant.

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N. Trusler, W. Morrow, T. B. Adams, and F. Berry, for appellees.

BUSKIRK, C. J.—This was a proceeding supplementary to execution, instituted by appellant against appellees.

Issue, trial by the court, finding for appellees, motion for a new trial overruled, and judgment on the finding.

Overruling the motion for a new trial is assigned for error, and presents all the questions in the record.

It is claimed by counsel for appellant, that the court below erred in the exclusion of evidence. The third reason for a new trial is as follows :

“3. The court erred, on the trial of the cause, in excluding evidence offered by the plaintiff, to the exclusion of which the plaintiff excepted at the time.”

It has been decided by this court, from time to time for the last twenty years, that such a reason was too vague and indefinite to present any question for review here. The reason of the rule has been so fully and often stated that we would not be justified in re-stating it.

It is also claimed that the finding is not supported by the evidence. The case made is this : John Roberts, on the 13th day of July, 1869, recovered judgment in the Franklin Common Pleas Court against Ulysses V. Kyger and John Deitz, and the foreclosure of two mortgages executed by Kyger and wife on certain real estate therein described ; that on the 13th day of August, 1869, said real estate was sold, on the decree of foreclosure, to Roberts for the sum of two thousand dollars ; that on the 10th day of August, 1870, said Deitz, desiring to redeem said property from sale to Roberts, applied to Lawrence Fragasser, who furnished him two thousand two hundred and sixty-five dollars with which to redeem such property, on the express understanding and agreement that Deitz was to use such money as a special deposit to be placed in the hands of the clerk of said court for the use of Roberts, and for the sole purpose of redeeming said property ; and that the ownership of said money was not to pass out of said Fragasser unless it was used in the redemption of said property, in which case

he was to have a mortgage on the said property ; that such money was tendered Roberts, who refused to receive it, and it was afterward deposited with Harrell, the clerk of said court, for the purpose of redeeming said property, who still retained the possession thereof as such clerk for said purpose ; that on the 1st day of July, 1871, Deitz, without the knowledge of Fragasser, executed to him and delivered to the recorder a mortgage on the property purchased by Roberts for the money furnished by Fragasser ; that on the 6th day of July, 1869, the appellant obtained in the said court a judgment against the said Kyger and Deitz for four hundred and eight dollars and thirty cents ; that afterward an execution was issued to the sheriff of said county, where the said Deitz resided, which was returned unsatisfied, with an endorsement that there was no property on which to levy ; and that said judgment remained unpaid.

It is quite earnestly contended by counsel for appellant, that the money deposited by Deitz with the clerk for the redemption of said real estate belongs to the said Deitz, and is subject, in the hands of the clerk, to be applied to the payment of the judgment in favor of appellant.

It is, on the other hand, insisted that, under the agreement between Deitz and Fragasser, such money, if not used for the redemption of such real estate, belonged to Fragasser and could not be applied to the payment of the judgment in favor of appellant.

We do not find it necessary to decide to whom the money will belong in the event that it is not used for the redemption of said real estate.

It does not appear, from the record, what right Deitz had to redeem such land, or whether such right had been judicially determined ; but it does confessedly appear that the money in question was delivered to the clerk, as a special custodian, for a specified purpose ; and, until the right of redemption is determined, the money cannot be taken from the custodian and applied to another and quite different purpose.

Sharpe *et al.* v. The St. Louis, etc., R. W. Co.

We think the finding was correct, and that the court rightly overruled the motion for a new trial.

The judgment is affirmed, with costs.

SHARPE ET AL. v. THE ST. LOUIS AND SOUTH-EASTERN
R. W. Co.

49 296
189 301

STREET.—Railroad.—Action to Recover Real Property.—An action for the recovery of the possession of real estate may be maintained against a railroad company occupying such real estate, being a street in a city, by virtue of a grant from the city council.

From the Spencer Circuit Court.

J. S. Buchanan, H. C. Gooding, and C. Buchanan, for appellants.

A. Iglehart and J. E. Iglehart, for appellee.

DOWNEY, J.—This was an action by the appellants against the appellee, to recover the possession of certain real estate in the city of Evansville. The action was commenced in the Vanderburgh Circuit Court, from which the venue was changed to the Spencer Circuit Court. The complaint is in three paragraphs. The defendant answered in two paragraphs, setting up a claim to the right to occupy the real estate, it being a street in the city, by virtue of a grant from the city council. A demurrer to each of the paragraphs of answer was filed by the plaintiff, and overruled by the court. There was judgment for the defendant.

The overruling of the demurrers to the paragraphs of the answer is the error assigned. According to the principles recognized and applied in *Cox v. The Louisville, etc., R. R. Co.*, 48 Ind. 178, this ruling was wrong.

The judgment is reversed, with costs, and the cause

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remanded, with instructions to sustain the demurrer to the paragraphs of the answer, and for further proceedings.

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49	297
144	42

PRACTICE.—*Relief from Judgment Taken by Default.*—*Affidavits.*—In an application, under the last clause of amended section 99 of the code (3 Ind. Stat. 373), to be relieved from a judgment taken by default, the party applying for relief must show that he has a meritorious defence or cause of action, as the case may be, and this should be supported by his affidavit; and on this point counter affidavits will not be received; but in respect to the grounds on which relief is asked, evidence will be heard on both sides.

SAME.—Such application may be by motion or complaint, and may be tried upon affidavits, depositions, or oral testimony, and if made during the term, no notice is required; if after the term, notice should be given. An answer is not necessary in such case.

SAME.—*Pleading.*—A complaint to set aside a judgment rendered by default, on the ground of fraud, where the only fraud alleged is, that the plaintiff commenced the action when there was nothing due him, is bad.

SAME.—A party against whom a judgment by default has been rendered must seek relief under the last clause of section 99 of the code.

SAME.—*Excusable Neglect.*—A failure to appear to an action on an account, when summoned, induced by a belief that the action was based on a note given by the defendant to the plaintiff, to which he had no defence, will not constitute excusable neglect, for which a default can be set aside.

From the Elkhart Circuit Court.

R. M. Johnson, for appellants.

J. H. Baker, J. A. S. Mitchell, and J. D. Osborn, for appellees.

BUSKIRK, C. J.—This was a proceeding by the appellants against the appellees, under section 99 of the code as amended by the act of 1867, 3 Ind. Stat. 373, for relief from a judgment theretofore rendered, upon the ground of “mistake, inadvertence, surprise or excusable neglect.”

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The appellants allege in their complaint that appellee Jones brought suit against them on an account, at the March term, 1871, and that they were duly served with summons therein; that, at that time, they were indebted to said Jones on a note which they had given him, and which became due in the spring of 1871; that he had no other right of action against them; that they had no notice of an assignment of said note by Jones to any one; that they had no defence to make to such note; that they lived fourteen miles from the county seat where said action was commenced against them; that they believed said Jones still held said note, and knew they were not indebted to him on any other claim or account whatever, and so knowing and believing, they did not appear in said court to said action, but suffered judgment to go by default against them, under the belief that such action was brought on such note, which was then due, and was the only cause of action which he held against them; that when they entered replevin bail on said judgment, they were informed by the clerk of the amount of said judgment, and it being about the sum they supposed was due on the note, they were still further confirmed in the belief that the said suit was upon the note they had given said Jones; that they did not discover the fraud which had been practised upon them by the said Jones until in April, 1871, when they were sued in said court by one Lutz, on the note they had given said Jones, and who claimed to hold the same by indorsement; that as soon as the said Jones obtained a judgment on said account, he assigned the same to the Studebaker Bros. Manufacturing Co. as collateral security, in furtherance of his fraud upon them; that said judgment was unjust, wrongful, and fraudulent, and without foundation in right, and was taken against them through their inadvertence, oversight, and excusable neglect, and they ask to be relieved against the same, and that it be declared null and void.

The appellee Jones answered by a denial.

The Studebaker Bros. Manufacturing Co., failing to answer, was defaulted.

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The cause was submitted to the court for trial and resulted in a finding for the appellees.

The appellants moved the court for a new trial, but the motion was overruled, and final judgment was rendered for the appellees.

The error assigned challenges the action of the court in overruling the motion for a new trial.

The appellees have assigned as a cross error that the complaint does not contain facts sufficient to constitute a cause of action.

The first and principal reason relied upon for a new trial is based upon the action of the court in permitting the appellees to introduce evidence tending to show that the appellee Jones had a just cause of action, and that the appellants had no defence to such action.

The solution of the question depends upon the nature of this proceeding. If it can be regarded as an application, under the last clause of section 99, to be relieved of the judgment which was taken against the appellants by default, then the evidence was incompetent and improper. In such a proceeding, the party applying for relief from such judgment should show that he has a meritorious cause of action or defence, as the case may be, which is involved in the judgment from which he seeks to be relieved, and this should be supported by his affidavit. On this point, counter affidavits will not be received, because that would put in issue the merits of the original action, which cannot be tried until the default is set aside. But in respect to the grounds on which relief against the judgment is asked, evidence will be heard on both sides, because these matters may properly be put in issue. *Hill v. Crump*, 24 Ind. 291 ; *Buck v. Havens*, 40 Ind. 221.

We cannot so regard this proceeding. An application to be relieved from a judgment rendered on default may be by motion or on complaint. The evidence may consist of affidavits, depositions, or oral testimony. No answer is required. *Buck v. Havens*. If made during the term, no notice is required. *Burnside v. Ennis*, 43 Ind. 411. If made after the term, notice should be

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given. The whole purpose of the proceeding is to set aside the default, so that the action may be prosecuted or a defence made. The proceeding is a summary one, but both parties may file affidavits upon the point on which the relief is sought. If the default is set aside, the cause can be tried on its merits.

This action was commenced by a complaint and summons. A rule was taken for an answer, and one was filed. The cause was submitted to the court for trial, and was heard upon oral testimony. The complaint did not ask to have the judgment set aside, and the appellants admitted to defend. The whole case seems to have proceeded upon the theory that the judgment was fraudulent, and the prayer of the complaint was, that such judgment should be adjudged to be null and void.

If this could be treated as a proceeding under sec. 356 of the code, 2 G. & H. 215, the evidence objected to would be admissible, because it tended to prove that the plaintiff in the original action had a just and meritorious cause of action, and hence tended to disprove fraud.

Regarding this as a proceeding to set aside the judgment on the ground of fraud, we think the complaint was defective. The only fraud alleged against Jones is, that he commenced an action against appellants when there was nothing due to him. The appellants, by their failure to appear and answer the complaint, admitted that the plaintiff had a cause of action and was entitled to a judgment for some amount. With this judgment against them, the appellants are in no condition to assail the judgment on the ground of fraud. Their default admits a cause of action. While the judgment by default stands, the appellants have no standing in court, except to move to set aside the default, and to be heard upon the assessment of damages. *Briggs v. Sneghan*, 45 Ind. 14; *Fisk v. Baker*, 47 Ind. 534.

It is well settled that a party against whom a judgment by default has been rendered must seek relief under the last clause of sec. 99. *Woolley v. Woolley*, 12 Ind. 663; *Robertson v. Bergen*, 10 Ind. 402; *Frazier v. Williams*, 18 Ind. 416; *Webster*

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v. Maiden, 41 Ind. 124; *Fisk v. Baker*, 47 Ind. 534, and the authorities there cited.

Treating this proceeding, as counsel for appellants treat it, as one under section 99 of the code, the whole proceedings are irregular and informal. There should have been no complaint. There should have been no answer. The motion should have been heard upon affidavits. The evidence objected to was improperly admitted, but we cannot for that reason reverse the judgment, for the reason that, upon the cross assignment of error we must hold the complaint bad. The only excuse offered for the failure of the appellants to appear to the action, when summoned, was the belief on their part that the action was based upon the note which they had given to Jones, and to which they had no defence. We do not think this could be regarded as "excusable neglect." In a note to *Coe v. Givan*, 1 Blackf. 367, the following passage from 2 Graham & Waterman on New Trials, 1026, is quoted:

"When a person receives a notice of trial, he is put on inquiry to prepare his case. The law fixes the period of notice so far ahead of the sitting of the court, as to give parties ample opportunity to ascertain just what testimony they will need and to procure it."

It is difficult to define just what is meant by "excusable neglect," but it is quite certain that gross and inexcusable neglect, such as the appellants were guilty of, cannot be regarded as "excusable neglect." They not only failed to appear when summoned, but they afterward went to the clerk's office and put in replevin bail and failed to examine the judgment or inquire of the clerk upon what the judgment was based. The law favors the vigilant.

The judgment is affirmed, with costs.

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THE ST. LOUIS AND SOUTH-EASTERN RAILWAY COMPANY
v. SMUCK ET AL.

49	309
126	130
49	302
132	141
40	303
152	335

RAILROAD.—Bill of Lading.—Construction of.—Where a railroad company received freight to be transported partly by rail and partly by water, and it was stipulated in the bill of lading, that “it is especially agreed and understood that the company is not responsible * * for loss or damage on the lakes or rivers, unless it can be shown that such damage or loss occurred through the negligence or default of the agents of the company;” and the freight, after being carried by the defendant, was placed upon a whariboat, awaiting the arrival of a packet wherein to ship it, and the whariboat sunk without the fault of the railroad company, and the freight was lost;

Held, that the loss was not one occurring on the lakes and rivers within the meaning of the bill of lading.

Held, also, that the bill of lading should be construed to mean, that the carrier was not to be responsible, in the absence of negligence, for loss or damage occurring in the navigation of the lakes or rivers.

SAME.—Contracts not clear in their meaning, by which common carriers seek to avoid the responsibility which the law imposes upon them, should be construed most strongly against them.

From the Vanderburgh Circuit Court.

A. Iglehart and *J. E. Iglehart*, for appellant.

C. Denby and *D. B. Kumler*, for appellees.

WORDEN, J.—Complaint by the appellees against the appellant, as follows, viz.:

“The said Charles Smuck, Gabriel Smuck, Joseph Dosch, and John C. Shoemaker, plaintiffs, complain of the said defendant, the St. Louis and South-Eastern Railway Company, and say, that prior to the 9th day of September, 1873, the said plaintiffs were the owners of a mill, called the Superior Mills, located at Cannelton, Indiana, and defendant owned, operated, and ran a railroad extending from St. Louis, Missouri, to Evansville, Indiana, which railroad crossed the Illinois Central at Ashley, in Illinois; that the plaintiffs were engaged in buying wheat at Sandoval, in the State of Illinois, for shipment over the said Illinois Central Railroad to Ashley, and thence to Cannelton, Indiana, over the said railroad of the defendant from Ashley to Evansville, and thence by river to

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Cannelton, Indiana ; that being desirous of making an engagement to ship wheat as aforesaid with said defendant, the plaintiffs entered into negotiations with said defendant, and on the 9th day of September, 1873, the said defendant made to the plaintiffs the following written proposal, which was accepted by said plaintiffs, and which reads as follows :

“ ‘ EVANSVILLE, IND., September 9th, 1873.

“ ‘ CHAS. SMUCK : Rate on wheat in sacks, in car-load lots, Sandoval to Cannelton, Indiana, river from Evansville, thirty-three cents per one hundred pounds. Answer to St. Louis, if accepted. Rate will be good as long as navigation for regular large Louisville boats.

A. E. SHRADER.

“ ‘ 44 D. D. Paid.

G. F. A.’

“ The plaintiffs, in pursuance of said contract, delivered to the Illinois Central Railroad Company forty thousand pounds of wheat, being three hundred and thirty-two sacks of wheat, containing seven hundred and fifty bushels, of the value of one thousand two hundred dollars, to be safely carried to Ashley, Illinois, and there delivered to the defendant under said contract above written, and to be by said defendant thence transferred to Cannelton, Indiana, and then delivered to the plaintiffs for a certain reward to be by the plaintiffs paid on that behalf ; that at the time of the delivery to the said Illinois Central Railroad Company, said company delivered to the plaintiffs the bill of lading, which reads as follows :

“ ‘ GRAIN CONTRACT.

“ ‘ SANDOVAL STATION, September 15th, 1873.

“ ‘ Received from Chas. Smuck, grain in bulk, in apparent good order, by the Illinois Central Railway Company, consigned as below, to be delivered as marked and described in the margin, subject to the conditions herein contained, and payment of freight at special rate of twenty-six cents to Evansville, Indiana, per one hundred pounds, and such other expenses or charges as may have accrued on said grain.

“ ‘ It is especially agreed and understood, that the company is not responsible for loss by unavoidable leakage or shrinkage of said grain, or damage of any kind occasioned by delay

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from any cause or change of weather, or for damage or loss by fire, or for loss or damage on the lakes or rivers, unless it can be shown that such damage or loss occurred through the negligence or default of the agents of the company ; and it is further expressly understood, that for all loss and damage occurring in the transit of said grain, the legal remedy shall be against the particular carrier or forwarder only in whose custody the same may actually be at the time of the happening thereof, it being understood that the said Illinois Central Railroad Company assumes no other responsibility for its safety or safe carriage than may be incurred on its own road.

“ ‘ The said Charles Smuck, in consideration of said special rate, hereby expressly agrees that said grain is not to be weighed by said railroad company at the place of shipment, nor to be delivered at any other place than the one above named ; said railroad company may deliver the grain upon its arrival at place of destination, and the shipper will furnish the revenue stamp required by law for this contract.

“ ‘ CHARLES SMUCK & Co., Consignor.

“ ‘ L. NOWLAND, Agent,

“ ‘ [Five Cent Stamp.] I. C. R. R. Co.

Marks and Consignee.	No.	Description of Articles.
Superior Mills,	1	Car Wheat, 174 bags.
Cannelton, Ind.,	1	do. do. 158 do.
Via Evansville, Ind.		Shipper's load'g and count.
		Car No. 4014.
		“ “ 714.

“ And the plaintiffs say that the said Illinois Central Railroad Company did duly deliver said wheat to said defendant, at Ashley, Illinois, and the said defendant accepted and received the same under said contract above set out, and thereby agreed to comply with the conditions thereof, and to deliver said wheat to plaintiffs at Cannelton, Indiana, in consideration that plaintiffs had agreed to pay thirty-three cents per hundred pounds for transporting the same from Sandoval, Illinois, to Cannelton, Indiana ; and plaintiffs say that said wheat duly arrived at Evansville, Indiana, having been trans-

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ported over the defendant's said road ; but the said defendant, regardless of its duty as a common carrier, did not take proper care of said wheat, but wholly neglected to do so, and placed the same upon its wharf-boat at Evansville, Indiana, then lying in the Ohio river at Evansville, Indiana ; and while said wheat was so on said wharf-boat, the said wharf-boat sunk in said river, and the greater part of said wheat, to wit, five hundred bushels thereof, was wet, damaged, and became worthless, and thirty-eight sacks were delivered in a damaged condition, the injury thereto amounting to one hundred dollars ; and plaintiffs say that the value of said wheat so damaged amounted to six hundred dollars ; wherefore they demand judgment for seven hundred dollars, and other proper relief.

“DENBY & KUMLER,
“Attorneys for Plaintiffs.”

To this complaint the defendant filed an answer in two paragraphs, in the following form :

“Par. 1. Said defendant says that it admits that the plaintiffs were engaged in buying wheat at Sandoval, in the State of Illinois, for shipment over the Illinois Central Railroad to Ashley, and thence to Cannelton, Indiana, over the defendant's road to Evansville, thence by river to Cannelton, Indiana.

“And the defendant says, by the course of transportation the said wheat so shipped by these plaintiffs was transported in cars from said Sandoval, over said Central Railroad and the defendant's road, to Evansville, and then transferred to the defendant's wharf-boat, and there kept until the arrival of the next packet from Louisville, and there laden on said packet and carried to Cannelton ; that all freight transported by the defendant over its road before and after the 9th day of September, 1873, to Evansville and thence to points on the Ohio river above Evansville, was transported to said wharf-boat in the manner aforesaid, and carried over and upon the same, and thence laden upon the packets in the manner aforesaid, which was the usual, ordinary, and only manner of transporting

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freight from Sandoval to Cannelton aforesaid, all of which was, on the day and year aforesaid, well known to the plaintiffs.

“ The défendant also admits the transmission to the plaintiffs of the telegram aforesaid, and that the plaintiffs, in pursuance of the terms of said telegram, delivered to the said Central Railroad Company the said wheat mentioned in said complaint, according to the tenor and effect of the bill of lading then and there executed by said company. The defendant also admits that said Central Railroad Company then and there executed the bill of lading, of which a copy is set out in the complaint, and transported said wheat to Ashley, and delivered the same to said defendant; and the defendant avers that it took possession of said wheat, with a duplicate of said bill of lading, and then and there undertook to complete said contract of affreightment according to the true intent and meaning of said bill of lading, and according to the usage aforesaid. And the defendant says that it safely transported said wheat over its said road to the city of Evansville, and placed the same upon said wharf-boat then and there lying afloat in the Ohio river safely and securely moored to the defendant's wharf, the same being then and there safe, sound, and seaworthy, there to await the arrival of the next packet, which was due the next day after the lading of said wheat in the usual manner of transportation as aforesaid; and that while the said wheat was thus upon said wharf-boat awaiting shipment upon the said packet, without any unusual or unnecessary delay, said wharf-boat, without any fault or negligence on the part of the defendant, but on account of some latent defect which could not be seen, and could not have been discovered by ordinary care and diligence, sank in the Ohio river, whereby the wheat was damaged in the manner complained of in the complaint; and the defendant denies that said loss or damage resulted from any disregard of duty by the defendant, or any want of proper care, or any negligence of duty on the part of the said defendant in the premises.

“ Par. 2. Said defendant, for further answer, says that said

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wharf-boat was sunk in the Ohio river by unavoidable accident and without any negligence or want of care or diligence on the part of the said defendant; wherefore said defendant says that said loss and damage did not render the defendant liable on said bill of lading.

“ASA & J. E. IGLEHART,

“Attorneys for Defendants.”

Demurrers for want of sufficient facts were sustained to the two paragraphs of answer, and exception. Final judgment for the plaintiffs below.

The only question made here relates to the ruling on the demurrers.

It is assumed in the argument of counsel for the appellant, the St. Louis and South-Eastern Railway Company, that she can, under the circumstances, avail herself of the stipulations contained in the bill of lading executed by the Illinois Central Railroad Company to Smuck. And it is argued that the loss was within the class for which it was stipulated that the company should not be liable. Both these propositions must be maintained, or the defence must fail. The appellees controvert both propositions.

We think it unnecessary to decide the first, but note the following authorities, cited by counsel for the appellees, having some bearing upon the question: *Maghee v. The Camden & Amboy R. R. Company*, 45 N. Y. 514; *The Aetna Ins. Co. v. Wheeler*, 5 Lansing, 480.

Assuming, without deciding, that the first proposition is with the appellant, we proceed to the question whether the loss, as shown by the pleadings, was one for which it was stipulated that the company should not be liable. The wheat, it appears, arrived safely at Evansville, and was there placed upon a wharf-boat floating in the river, but moored to the wharf, to await the arrival of the next packet in order for shipment thereon to Cannelton, and while thus upon the wharf-boat, the latter, from some unknown cause, sank in the river and damaged the wheat. The stipulation in the bill of lading affecting this question is as follows:

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“It is especially agreed and understood, that the company is not responsible * * * for loss or damage on the lakes or rivers, unless it can be shown that such damage or loss occurred through the negligence or default of the agents of the company.”

Negligence is negatived, and the question is whether the loss took place on the river, within the meaning of the stipulation set out. It is established in this State, that a common carrier may, by express contract, relieve himself to some extent from the strict liability which the common law imposes upon him, no negligence being stipulated for. *The Michigan, etc., R. R. Co. v. Heaton*, 37 Ind. 448.

But, in our opinion, contracts not clear in their meaning, by which common carriers seek to avoid the responsibility which the law imposes upon them as such, should be construed most strongly against them. In this case, the carrier was not to be responsible, in the absence of negligence, for loss or damage “on the lakes or rivers.” This was intended to convey the idea, and should, as we think, be construed to mean, that the carrier was not to be responsible, in the absence of negligence, for loss or damage occurring in the navigation of the lakes or rivers.

The wheat, when it was lost, was stored on a wharf-boat, which floated, to be sure, upon the waters of the river, awaiting the arrival of the packet on which it was to have been shipped to its port of destination. The wharf-boat served as a convenient storehouse for the wheat while awaiting shipment; but the navigation of the river had not been commenced in respect to the wheat, when it was lost; nor had it been shipped upon the craft by which it was to have been transported. It was not lost or damaged “on the river,” within the meaning of the contract.

The demurrers to the paragraphs of answer were, therefore, correctly sustained.

The judgment below is affirmed, with costs.

Landers *et al.* v. George *et al.*

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49	309
167	532

CHATTEL MORTGAGE.—*Replevin.*—*Possession of Mortgaged Property.*—*Levy on Same.*—*Conclusiveness of Judgment in Replevin.*—Where mortgagees of personal property instituted an action of replevin against a sheriff, who had levied on the property, and the sheriff answered by a general denial, and also that he levied on the property by virtue of certain executions, and that it was at the time in the possession and the property of the execution defendants, and subject to the levy, and the record showed that after a demurrer was sustained to a reply of the mortgagees, the cause was "submitted to the court for trial as to the value of the property," and the court thereupon found the value, and that the defendant (the sheriff) was entitled to have the same returned to him, and, on failure to return, that he recover the value thereof, and assessed damages for the detention of the property, and rendered judgment on the finding;

Held, that the case went to the court for a full trial of the issues, notwithstanding what the clerk said as to what was to be tried, and that such proceedings would conclude the mortgagees, in a suit against them on the replevin bond by the sheriff and the execution plaintiffs, as well as in a suit by such mortgagees against the sheriff and the execution plaintiffs, claiming the property and the proceeds of it under their mortgage, as to the title, right of possession, and value of the mortgaged property, and all remedy to enforce their rights under the mortgage, as against the sheriff and the execution plaintiffs.

SAME.—The fact that the possession of mortgaged personal property has been surrendered by the mortgagor to the mortgagee will not prevent a sheriff, holding executions in favor of other creditors of the mortgagor, from levying upon and selling the equity of redemption, until the mortgagee has, by legal notice and sale of the goods or by a judicial foreclosure and sale, cut off the equity of redemption.

SAME.—Where it is provided in a chattel mortgage that, in default of payment of the mortgage debt, the mortgagor shall deliver the property to the mortgagee, such delivery will not vest the absolute ownership of the property in the mortgagee or free the property from the equity of redemption.

SAME.—*Action on Replevin Bond.*—Where the court in an action of replevin finds in favor of the defendant, that he is entitled to a return of the property, and finds its value, and renders judgment for the return and, on failure to return, for the value of the property, this will give the defendant a right of action on the replevin bond for the amount of damage to him, not exceeding the value of the property not returned.

RECORD.—*Conclusiveness of.*—Where the record in a cause tried shows what was found and adjudged by the court, a party cannot allege and prove in a collateral proceeding that such matters were not determined.

Landers et al. v. George et al.

From the Tipton Circuit Court.

J. E. McDonald, J. M. Butler, W. R. Harrison, and W. S. Shirley, for appellants.

J. Hanna, F. Knefler, and C. L. Holstein, for appellees.

DOWNEY, J.—This record presents two cases between the parties; one commenced by the appellants against the appellees, and the other commenced by the appellees against the appellants. It presents also a question as to the operation and effect of a judgment in a third case between the parties, which was terminated before the commencement of the other two. This last named action, which we will for convenience designate as number one, was brought by Landers and others against George, sheriff of Tipton county, for the recovery of the possession of personal property, consisting of a stock of dry goods, groceries, provisions, etc., of which it was alleged the plaintiffs were the owners and entitled to the possession, and which had been wrongfully taken, and were unlawfully detained, by the defendant. The goods were alleged to be of the value of eighteen hundred dollars. Judgment was asked for the recovery of possession of the property, and for ten dollars damages for the detention thereof.

The defendant answered:

1. A general denial.
2. Property in Harlin and Boulden.
3. Property in the defendant.
4. That certain judgments had been rendered against Harlin and Boulden, on which executions had been issued to the said George, as sheriff, which he had levied on the goods, which he alleged were at the time the goods of Harlin and Boulden, in their possession, and subject to the executions; that the executions were still in his hands, and the goods subject to the lien thereof.

The second and third paragraphs of the answer were struck out on motion of the plaintiffs, and there was a reply to the fourth, a demurrer to which was filed by the defendants and sustained by the court.

The record in the cause then proceeds as follows: "And

the plaintiff failing to except further, this cause is now submitted to the court for trial as to the value of the property mentioned in the complaint; and the court having heard and examined all the evidence, and being sufficiently advised in the premises, does find that the property mentioned in the complaint is of the value of two thousand nine hundred dollars, and that the defendant is entitled to have the same returned to him, and upon failure of the plaintiffs so to return the same, is entitled to recover the value thereof; and the court assesses the damages of the defendant against the plaintiffs, on account of the detention of said property, at the sum of one dollar.

“It is therefore considered by the court, that the defendant recover of the plaintiffs the sum of one dollar, his damages assessed by the court, and all costs and charges, etc.; and further, that he recover of the plaintiffs the property mentioned in the complaint; and, upon the failure of the plaintiffs to return to the defendant said property, that he recover of the plaintiffs the value thereof, viz., the sum of two thousand nine hundred dollars.”

The residue of the entry relates to the prayer for, and the granting of, an appeal to this court. This appeal was perfected, and, in this court, the judgment below was affirmed. See 40 Ind. 160.

Before the appeal was taken in that case, however, a suit on the replevin bond, which we may designate as number two, was instituted by the appellees in this case, the sheriff and the plaintiffs in the executions which he held, against the appellants herein.

The complaint sets out in detail the recovery of the several judgments against Harlin and Boulden, the issuing of executions, their levy on the property, the institution of the action of replevin, the execution of the bond, the issue and judgment in the replevin suit, the failure of the appellants herein to return the goods according to the judgment in the replevin suit; concluding with a prayer for judgment for the value of the goods, two thousand nine hundred dollars.

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While the appeal in the replevin suit was pending in this court, the suit on the replevin bond, number two, was suspended. After the case number one was decided on appeal, the defendants in that action answered, in number two, on the replevin bond :

1. A general denial.

2. The second paragraph was held bad on demurrer, after a portion of it had been struck out ; no question is made as to this ruling.

3. In the third paragraph, as to part of the amount demanded, the defendants alleged, that before the issuing and levy of the executions, on the 15th day of January, 1869, Harlin and Boulden were the owners of the stock of goods, etc., and were indebted to the defendants in certain amounts mentioned, and being so indebted they, on the day and year aforesaid, executed to the defendants a bill of sale of the stock of goods, etc., to secure the payment of said debts ; that the same was duly acknowledged and recorded on the day of its date in the office of the recorder of Tipton county, etc., being the county in which the said goods, etc., were then situated, and in which the mortgagees resided ; that said Harlin and Boulden failed to pay said debts, and the condition of the bill of sale was broken before the issuing of the said executions or either of them ; and that the lien of sale entitled the defendants, upon said forfeiture, to possession of so much of said stock of goods ; wherefore the defendants say, as to so much of the value of said goods, etc., as was necessary to satisfy said debts, the said plaintiffs are not entitled to any judgment upon said undertaking, being the amount aforesaid.

4. This paragraph does not present any question which at all affects the case, as it comes before us.

5. That it is true the plaintiffs brought their action of replevin and executed the undertaking, etc., as set forth in the complaint, and that judgment was rendered against these defendants, the plaintiffs in said action ; but these defendants say that the only matter, question, or issue submitted to the court upon the trial and final hearing of said action of replevin,

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and the only matter, question, or issue in said action which was competent and lawful for said court to try, upon the submission of said cause for trial as shown by the record therein, was the matter, question, and issue as to the value of the property mentioned in the complaint therein, and that the title and ownership of the property and the right to the possession of said property were not, nor either of them, submitted to or tried or determined by said court in said cause ; and they aver that at and before the time of the execution of said undertaking, and at the time of the said submission to trial of said matter, the said plaintiffs in that action were the owners, had the title, and were entitled to the ownership of said property and the proceeds thereof; that they were so the owners thereof and entitled to the possession thereof and to the proceeds thereof, by virtue of a mortgage made by Harlin and Boulden to them, a copy of which is alleged to be filed, and of the delivery of said goods to them, in discharge of the debts secured by said mortgage, after the execution of said mortgage upon the maturing of said debts, they not having paid said debts or any part thereof, or in any other manner than by the delivery of said property.

The paragraph then professes to make a copy of the mortgage and a transcript of the judgment and proceedings in the action of replevin parts thereof.

It is further alleged that the delivery of the said property to them by Harlin and Boulden, in pursuance of the mortgage, was before the time of the rendition of the said judgments stated in plaintiffs' complaint, or any of them, and long before the issue or service of any of said executions, and that said property was of no greater value than the amount of the debts due from said Harlin and Boulden to said Landers and others ; that all the matters involved and embraced in plaintiffs' complaint herein are involved and embraced in the complaint of the defendants against the plaintiffs in this action now pending in this court, and can and must be determined in said action, and they therefore ask that this cause be consolidated, tried, etc., in and with that action ; wherefore, etc.

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The plaintiffs demurred to the third and fifth paragraphs of the answer. The demurrer to the third was overruled, and that to the fifth was sustained.

Reply in denial of the third paragraph of the answer.

Cause number three was commenced last in order of time, and was by the appellants against the appellees. In the complaint it is alleged, that on the 15th day of January, 1869, at, etc., Harlin and Boulden were indebted to the plaintiffs, stating the amounts, and copies of the notes are alleged to be filed and made part of the complaint; that they were then the owners of the goods, etc., and mortgaged the same to the plaintiffs, and a copy of the mortgage, it is alleged, is filed, which was duly recorded, etc., on the day of its date; that afterward, in January, 1869, Harlin and Boulden delivered the goods to the plaintiffs, in pursuance of the mortgage, they having failed to pay said debts, etc., to enable the plaintiffs to sell and dispose of the same, and out of the proceeds to satisfy their debts; that at the time of such delivery, the said goods, etc., were of no greater value than the amount of said debts of Harlin and Boulden to the plaintiffs; that the plaintiffs, in the most careful and economical manner, sold the goods and received therefor about eighteen hundred dollars, and no more; that the expenses of such sale were about one hundred and forty dollars, leaving the net sum of about sixteen hundred and sixty dollars, and no more.

The dates and amounts of the judgments of the defendants are then stated, and it is alleged, that on the 5th day of February, 1869, executions were issued on each of said judgments to the defendant George, then sheriff of said county, which were then levied on the said goods, etc.; that such proceedings were had, that afterward, in the replevin suit, naming the parties, on the 8th day of May, 1869, these plaintiffs were ordered and adjudged to deliver said merchandise to the said George, as such sheriff; but before that time these plaintiffs had, in pursuance of their said mortgage and the delivery and transfer to them of said goods, etc., by Harlin and Boulden, fully sold and disposed of said goods, etc., as before averred. They aver

that they yet have in their possession the said sum of sixteen hundred and sixty dollars, the net sum realized from the sale of said goods, which they aver belongs to them by virtue of said mortgage and transfer of merchandise to them. They allege that the lien of said executions upon said merchandise has been fully and wholly discharged, by reason of the fact that the proceeds of the same were wholly applied to pay their said mortgage, which was a lien on said goods, etc., prior to the judgments and executions of the defendants; prayer, that the plaintiffs be adjudged the owners of the sum of money realized from the sale of said goods, etc.; that the defendants be adjudged to have no lien on the merchandise by virtue of their judgments and executions or the levy thereof; that defendants be enjoined from enforcing said judgments for the return of said merchandise, or from having any action or proceeding arising out of, or connected with, said judgment, etc.

The mortgage, a copy of which is filed, is in the usual form of chattel mortgages, and in the condition, or defeasance, provides as follows: "Now if the said Harlin and Boulden shall punctually pay said sum of money when the same shall become due, then the above conveyance to be void, otherwise to be in full force. The said Harlin and Boulden are to retain possession of said property until said debts become due, and upon default of payment of said money, shall deliver said property to Landers, Condit & Co., and Landers, Pee & Co., in proportion to the amount of their respective claims against said Harlin and Boulden."

The defendants in this case, appellees here, answered:

1. A general denial.
2. Payment by Harlin and Boulden before the suit was brought, in money and property other and different from the goods, etc., mentioned in the complaint.
3. This paragraph was adjudged insufficient on demurrer, and need not be set out.
4. That long before the commencement of this action, the plaintiffs, in an action by them instituted in the Tipton Circuit Court against Henry George, sheriff, etc., claimed by their

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complaint to be the owners and entitled to the possession of said personal property ; that the cause was put at issue ; that by the record and judgment in said cause, it was adjudged and determined that said goods were of the value of twenty-nine hundred dollars ; that the question as to the value of said goods was in issue, and the issue was submitted to the court to find upon the evidence ; that it was competent for the court to find the value of the goods in said cause, and the court did find and adjudge that said goods were of the value aforesaid ; and the court further found, in said cause, that the defendant in said cause was entitled to the possession of the goods ; that the plaintiffs should deliver the same to the defendant ; and that, on failure to deliver the same, the defendant recover of the said plaintiffs twenty-nine hundred dollars, the value of the same.

A transcript of said cause number one is made part of this paragraph of the answer.

It is also alleged, that the plaintiffs appealed from the said judgment to the Supreme Court, where the judgment was affirmed ; wherefore the plaintiffs are estopped to assert that the said goods were of any other value than said sum of twenty-nine hundred dollars, and are estopped to deny any of the facts adjudicated in said cause ; and defendants say said goods were of the value of twenty-nine hundred dollars ; and they deny that the said plaintiffs were the owners of said goods.

5. That long before the commencement of this action, the plaintiffs received from Harlin and Boulden, the persons who executed to the plaintiffs said pretended mortgage, a large amount of property, notes, effects, and choses in action of the value of a thousand dollars, a more particular description of which cannot be given, which were received on account of the indebtedness of said Harlin and Boulden to the plaintiffs, mentioned in the plaintiffs' complaint, as a credit thereon ; wherefore, etc.

Demurrers to the second and fourth paragraphs of the answer were filed by the plaintiffs and overruled by the court.

The plaintiffs replied to the second and fifth paragraphs of

the answer by a general denial; and to the fourth paragraph they replied, that, admitting the bringing of the action by them against said George, and that the property in that case was and is the same as that mentioned in the complaint in this case, they say that the only matter, question, or issue which it was competent for the said court to hear and decide under the submission thereof to the court, as shown by the record thereof, was as to the value of the said property, and that the title and ownership and right to the possession thereof were not, nor was either of them, submitted to or decided by the court; that at the time of the levy on said goods by said George, as alleged in the fourth paragraph, and at the time of the trial and determination of said cause, and until the same was finally sold and converted into money, as alleged in the complaint, said property and the proceeds thereof belonged to and was the property of the said plaintiffs, and they, during all of said time, were entitled to the possession thereof, by reason of the mortgage, sale, and delivery thereof to the plaintiffs by said Harlin and Boulden, as shown in the plaintiffs' complaint herein; and they say that the rights, questions, and allegations averred, stated, and set forth by them in their complaint herein were not submitted to, tried by, or heard and determined in the action set forth in said fourth paragraph of defendants' answer or otherwise, but remain entire and undetermined; and they deny such allegations in said fourth paragraph of defendants' answer not specially herein replied to and controverted.

The said actions number two and three, being thus at issue, were, by agreement of the parties and the order of the court, consolidated, and the cause proceeded in the style of *Landers and others v. George and others*, the style of action number three. A trial was had by the court, and the court found for the defendants, assessing their damages at fifteen hundred and three dollars and thirty-seven cents. The plaintiffs moved the court for a new trial, which motion was overruled, and final judgment was rendered in favor of the defendant George and others, for the amount of the finding.

The following are the errors assigned :

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1. Sustaining the demurrer to appellants' fifth paragraph of answer to appellees' complaint on the replevin bond.

2. Refusing to permit appellants to give evidence offered at the trial by witnesses Landers and Boulden, as shown in exceptions.

3. Refusing to grant a new trial on appellants' motion and reasons.

4. In overruling appellants' demurrer to the second and fourth paragraphs of appellees' answer, in the action by appellants against appellees.

Counsel for appellants say, "the main point variously presented for consideration in this case may, we think, be stated as follows: Were the appellants, by the trial, proceedings, and judgment in the action of replevin begun by them in February, 1869, against the sheriff, Henry George, and determined in April or May, 1869, precluded from asserting in the subsequent actions, which, being consolidated and tried, are now before the court in this appeal, their title to the property in dispute and its proceeds, under their mortgage and the delivery to them by the mortgagees and owners of the property, in discharge of the debt, in accordance with the stipulations of the mortgage, before any right of appellees to the property intervened? In other words, were the questions of appellants' rights, in relation to the mortgaged property, so fully and fairly submitted, tried, and determined in the action of replevin, as that when they began this action they had no remedy to enforce their rights left to them?"

Counsel for the appellees say: "It is conceded by the appellants, in their brief, that the record now before this court presents but one question, and that is, whether the judgment in the replevin suit proper concludes them as to the title, right of possession, and value of the goods in controversy."

Under this agreement as to the question presented, we do not deem it necessary to examine the case with reference to each error assigned. In the action of replevin, there were two good paragraphs of answer:

1. A general denial.

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4. Property in the defendant by virtue of the levy of the executions in his hands, it being alleged that the property was the goods of the execution defendants and subject to the executions.

In this condition of the issues, the cause went to the court, and we think we must hold for a full trial of the issues, notwithstanding what the clerk says in the entry as to what was to be tried. The plaintiffs had not made default, ceased to prosecute the action, or withdrawn their appearance. They were yet in court when the cause was submitted for trial, so far as anything appears. The clerk says, they failed further "to except," the cause was submitted for trial, etc. The issues must necessarily have been tried before the court could render the judgment which was rendered. The court found that the property was of the value of two thousand nine hundred dollars; that the defendant was entitled to have the property returned to him; and that the damage of the defendant, on account of the detention of the property, was one dollar.

The fact that there were issues to be tried, and that the court did not limit its finding to the ascertainment of the value of the property merely, requires us to hold that there was a trial of the issues generally, and not a mere finding of the value of the property, the statement of the clerk that the trial was "as to the value of the property" to the contrary notwithstanding.

We think that we must hold, also, that the findings of the court decide the questions that the plaintiffs were not the owners or entitled to the possession of the property, as they alleged in their complaint. Necessarily, the plaintiffs must have failed to sustain their title to the property and right to its possession, or the court could not have found, as it did, that the defendant was entitled to a return of the property and damages for its detention.

The fact that Landers and others had a mortgage of the goods, and that the possession of the goods had been surrendered to them, as they claim, if true, did not prevent the sheriff from levying on them and selling the equity of redemption

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in them. Until the mortgagee had himself, by legal notice and sale of the goods or by a judicial foreclosure and sale of them, cut off the equity of redemption, it was liable to seizure and sale by the creditors of the mortgagor. 2 G. & H. 240, sec. 436; *Coe v. McBrown*, 22 Ind. 252; *The State, ex rel. Lines, v. Sandlin*, 44 Ind. 504.

There is nothing in the mortgage in this case which vests the absolute ownership of the goods in the mortgagees, on failure to pay the debt. It is provided in the mortgage, that upon default of payment of said money, Harlin and Boulden shall deliver the property to Landers and others. But we do not think that such delivery merely, if made, would free the property from the equity of redemption.

It was alleged, in the fourth paragraph of the answer of the sheriff in the replevin suit, that the property, when levied upon, was in the possession of the mortgagors, and it may be inferred that the court found this to be true, if the finding of that fact was necessary to justify the judgment for a return of the property to the sheriff. The court decided the issues in favor of the defendant, the sheriff, found the value of the property, and that the defendant was entitled to a return of it. It also rendered judgment for the return, and in default of return, for the value of the property. This gave the defendant in that action, as the representative of the execution plaintiffs or in connection with them, a right of action on the bond for the amount of the damage to them, not exceeding the value of the property which the plaintiffs had so failed to return.

But appellants submit that they may allege and prove that their rights were in fact not considered and adjudicated in the case, and they refer, in support of their position, to the following cases: *Cutler v. Cox*, 2 Blackf. 178; *Byrket v. The State*, 3 Ind. 248; *The State v. Brutch*, 12 Ind. 381; *Brandon v. Judah*, 7 Ind. 545; *Hargus v. Goodman*, 12 Ind. 629, and other similar cases. We have examined these authorities and think they do not apply to the question which is here involved. They are cases where the fact may be alleged and proved without a contradiction of the record, as to what was

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found and adjudged by the court. Here, as we have already said, the record must be regarded as showing a determination of the ownership and right to the possession of the property, and to allow an averment and proof to the contrary would be to allow the record to be impeached and contradicted, and that too in a proceeding in which the record is used merely to establish a fact found, and where it is attacked collaterally.

Counsel for appellants urge that there was no consent of their clients to the trial of any question in the case without a jury, except as to the value of the property. We have already said that we regard the other facts in the record as overruling the statement of the clerk in his entry, that the trial was to ascertain the value of the property only. The plaintiffs were in court and made no objection to the mode of trial, to the finding of the court, or to the judgment rendered. When they brought the case to this court on appeal, they made no such objection, and the judgment was in all things affirmed. If the clerk's entry should be regarded as stating the fact, still when the court went beyond what was submitted and made a finding of other matters, and rendered judgment thereon, the plaintiffs should have made the objection then in some proper way, and if the error was not corrected there, the point should have been urged on appeal to this court. The record of the finding and judgment cannot now, in a collateral proceeding, be varied, amended, or contradicted. If there was any error in the finding or judgment, it is only an error and does not at all affect the judgment while it remains unreversed. In favor of the conclusiveness of the finding and judgment, as evidenced by the record, we may cite *Fischli v. Fischli*, 1 Blackf. 360, *Day v. Vallette*, 25 Ind. 42, *Orosby v. Jeroloman*, 37 Ind. 264, and *Carr v. Ellis*, 37 Ind. 465, and cases cited.

It is clear that the answers of the appellants, in the action on the replevin bond, admitting as they do, that they did not prosecute the action of replevin with effect and without delay, and that, although they were ordered to do so, they did not return the property to the sheriff, can be no bar to that action.

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Brown v. Parker, 5 Blackf. 291; *Sherry v. Foresman*, 6 Blackf. 56; *Wallace v. Clark*, 7 Blackf. 298; *Davis v. Crow*, 7 Blackf. 129; *Hutton v. Denton*, 2 Ind. 644; *O'Neal v. Wade*, 3 Ind. 410.

The judgment is affirmed, with costs.

BUSKIRK, C. J.—I dissent from the foregoing opinion and judgment.

BURR v. THE TOWN OF NEWCASTLE.

TOWN.—*Power of Trustees.—Sidewalk.—Grade.*—The board of trustees of a town are authorized to establish the grades of streets, and to require the owners of lots, in constructing sidewalks, to make them conform thereto, without any petition on the part of property holders.

SAME.—*Certainty of Ordinance.*—An ordinance establishing the grades of certain streets in a town is not void for uncertainty, if the grades so established can be ascertained without difficulty.

From the Henry Circuit Court.

J. T. Elliott, W. H. Elliott, J. Brown, and J. M. Brown, for appellant.

M. E. Forkner and E. H. Bundy, for appellee.

BUSKIRK, C. J.—This was a proceeding by the appellee, to enjoin the appellant from constructing a sidewalk in front of his property, on the north side of Broad street, immediately east of Main street, upon the ground that he was constructing the same on a grade ten inches higher than that established by the ordinance of the said town.

A demurrer was overruled to the complaint, and this ruling is assigned for error and presents the first question for our decision.

Three objections are urged to the complaint:

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1. That the ordinance set out in the complaint is void, for the reason that it does not appear that a petition signed by a majority of all the resident owners of lots or parcels of land on said streets was presented to the board of trustees of said town prior to the passage of said ordinance, requesting the passage thereof.

2. That the ordinance in question is void for vagueness and uncertainty.

3. That the complaint is bad, because it does not specifically state what acts the appellant was doing in violation of said ordinance.

In support of the first objection, counsel for appellant refers us to the case of *The Town of Covington v. Nelson*, 35 Ind. 532.

Counsel for appellee contend that the ruling in the above case is wrong, and we are asked to overrule it. The question in that case involved the validity of certain proceedings relative to the construction of sidewalks, and we held that they were illegal, because the ordinance was not preceded by, and based upon, a petition signed by a majority of property holders, as required by section 8 of the act of April 27th, 1869. The forty-sixth section of the act providing for the incorporation of towns, etc., was amended in 1857 so as to require a petition of two-thirds of the property holders as the condition on which the trustees could order the improvement of streets, alleys, and sidewalks.

In deciding the case of *The Town of Covington v. Nelson*, *supra*, our attention was not called to an act entitled an act to compel owners of town lots to grade, and pave or plank sidewalks, etc., approved February 14th, 1859. 1 G. & H. 634. By such act, the trustees of towns are authorized to establish a grade and to compel the owners of lots to construct sidewalks, without any petition on the part of property holders. Similar power is conferred on the board of trustees by the ninth subdivision of section 22 of the original act for the incorporation of towns. 1 G. & H. 624.

In the case of *The Town of Covington v. Nelson*, *supra*, the

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question involved was the right of the trustees to construct sidewalks at the expense of the property holders. The question involved in the present case is the right of the trustees to establish a grade, by which the town and property holders should be governed in reducing the streets and alleys to the grade established, and in the construction of sidewalks ; which is a very different question from that involved and decided in the above case.

We entertain no doubt that the appellee possessed full power to establish the grade in question, without a petition on the part of property holders. The question here being different from that involved in the case we are asked to overrule, we decline to do so, but will wait to re-examine the question involved in that case until it is fairly presented.. To do so now would be *obiter*.

The ordinance in question is as follows :

“ An ordinance to establish the grade of certain streets in the town of Newcastle, therein specified, requiring sidewalks, pavements, crossings, and gutters to be made in conformity thereto, and declaring an emergency. Ordained December 26th, 1872.

“ Sec. 1. Be it ordained by the board of trustees of the town of Newcastle, that the grade of the several streets of the town of Newcastle, herein below named and specified, be and is hereby declared, defined, and established, as follows, viz. : Initial point of said grade, the top of a stone marked with a cross, and standing near north-west corner of Main and Broad streets, in said town ; from said initial point west to the north-east corner of Broad and Court streets, about twenty-one rods ; descent, three and eighty hundredths feet ; grade per rod, two and seventeen hundredths inches.

“ From the north-east corner of Main and Broad streets east to the corner of Broad and Elm streets ; distance, about twenty-one rods ; descent, two and seventy hundredths feet ; grade per rod, one and fifty-four hundredths inches.

“ From the north-east corner of Broad and Elm streets to the north-west corner of Broad and Mill streets ; distance, about

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twenty-one rods ; descent, nine and eighty hundredths feet ; grade per rod, five and twelve hundredths inches.

“ From said north-west corner of Broad and Mill streets to Fort Wayne, Muncie, and Cincinnati Railroad ; distance, about fifteen rods ; descent, three and fifty-five hundredths feet.

“ From south-east corner of Main and Broad streets to south-west corner of Broad and Elm streets ; descent, three and eighty hundredths feet ; grade per rod, two and seventeen hundredths inches ; distance, about twenty-one rods.

“ From grade stone at south-east corner of Broad and Elm streets east seventy-four feet ; grade, ten inches ; thence east to the south-west corner of Broad and Mill streets ; distance, about sixteen and one-half rods ; descent, nine and forty hundredths feet ; grade per rod, six and eighty-five hundredths inches.

“ From grade stone at south-west corner of Broad and Mill streets to Fort Wayne, Muncie, and Cincinnati Railroad ; distance, about fifteen rods ; descent, three and fifty-five hundredths feet ; from north-east corner of Broad and Main streets to south-east corner of Main and Pearl streets ; distance, about twenty-one rods ; descent, five and ninety-seven hundredths feet ; grade per rod, three and one-half inches.

“ From north-west corner of Broad and Main streets to south-west corner of Main and Pearl streets ; distance, about twenty-one rods ; descent, five and ninety-seven hundredths feet ; grade per rod, three and one-half inches.

“ From north-west corner of Main and Broad streets to south-west corner of Main and Broad streets ; distance, four rods ; elevation, one foot ; from thence south to the south-east corner of court-house square ; distance, eighty rods ; elevation, two and thirty-eight hundredths feet ; from south-east corner of Broad and Main streets south to Robert Smith's corner ; distance, eighty rods ; elevation, two and thirty-eight hundredths feet ; from this point south to the north-east corner of Main and Church streets ; elevation, one and forty hundredths feet. Grade stones set at the several corners govern their opposite corners where there are no corner or grade stones planted.

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“Sec. 2. All sidewalks, pavements, crossings, and gutters hereafter built, laid, or constructed along or upon said streets, are required to be made with reference to and in strict accordance with the grades as hereinbefore established.”

The third section declares an emergency.

We think the above ordinance is not void for uncertainty. There would be no difficulty in ascertaining therefrom the grade established. That is certain which is capable of being made certain.

The third objection to the complaint is untenable. The complaint alleges, in plain and express language, that the appellant is constructing his sidewalk ten inches higher than the grade established by the ordinance, and ten inches higher than it had hitherto been maintained. It seems to us that the allegations are as certain and definite as they could be made.

The appellant answered in three paragraphs, as follows:

“Comes defendant and for answer to plaintiff's complaint says that neither before nor at the time of the passage of the ordinance of said board of trustees, fixing the grade of the sidewalk in front of the defendant's property on Broad street, in said town, referred to in said complaint, nor at any time since the passage of said ordinance, did a majority of all the resident owners of property bordering on said street, on either side thereof, or bordering on the sidewalk on the north side of said street, where the defendant's property is situate, petition the said board of trustees of such town to grade, pave, gravel, macadamize, or otherwise improve said sidewalk or said Broad street along or in front of the square in which said property is situate, nor was any petition for the improvement of said sidewalk, or portion of said street, signed by any number of the resident owners of property fronting on said street ever, at any time, filed with or presented to said board of trustees. Wherefore defendant says said board of trustees had no power or authority to pass said ordinance, and that the same is null and void; wherefore he prays judgment.

“2. The defendant further says that the property owned by him and the sidewalk of which the pretended grade was fixed

and established by the said board of trustees, has had erected thereon a block of buildings for twenty years last past, except the vacant ground described in the complaint was made vacant by the building thereon being consumed by fire last summer; that the buildings adjoining to and east of the property of the defendant, occupy and cover all the front ground for a space of two hundred feet, and the grade in front of said buildings has heretofore been fixed by the owners of said property at the height of the grade attempted to be established and fixed by the defendant, which would then leave the floors and front base stones of said buildings ten inches above the grade thus established by them; that said grade, as established by all the property holders next and adjoining to the said property of the defendant, is now ten inches lower than the grade as established and used on the opposite side of said street for twenty years, and ten inches lower than the grade on said opposite sidewalk as established by the ordinance set forth in the complaint; that at the time the pretended grade was established by said board, this defendant had no notice of the same, nor was any notice given to him or any of the other property holders along said street or sidewalk, nor had there ever been any established before that time by any board of trustees, town council or other authority, and if the grade set forth in the complaint shall be upheld and enforced against this defendant and the other property holders adjoining him, it will leave their floors, some of them twenty inches and some of them twelve inches, above the level of said grade, and none of them less than ten inches above said grade; that said buildings are constructed of brick and stone, and cannot be changed to conform to the grade thus sought to be enforced against this defendant and the other property holders, as aforesaid, without great and irreparable loss or damage. The defendant further avers that in case said grade is enforced, he will have to cut down his floors, as will also all the other property holders fronting on said sidewalk, from the corner of Main and Broad streets east to the livery stable, a distance of one hundred and thirty feet, in which

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space there are six brick buildings, or they will have to place upon said sidewalk steps of the height of twenty inches to get into their buildings. Said defendant further says that no damage has ever been paid or tendered to him for or on account of the establishment of said grade; he further says that the town board or trustees, nor no other public authority, have ever made, improved, or repaired said sidewalk. Wherefore the defendant says that said ordinance, in so far as it affects this defendant, is unjust, illegal, and void.

"3. The defendant, for further and third paragraph of answer to the plaintiff's complaint, says, that since the commencement of this suit, to wit, on the 15th day of October, 1873, the trustees of said town, recognizing and agreeing that the grade as fixed by the ordinance set up in said complaint, for the sidewalk on the north side of Broad street, east of Main street, was wrong, unreasonable, and unjust, verbally agreed with the defendant (who is the owner of forty-five feet in width, fronting on Broad street, commencing at the corner of Broad and Main streets, and running east, and who has recently erected a new and permanent building, extending along his whole front on Broad street), that he might raise his pavement to a point at its south line, immediately south of his south-west corner, fixed by said trustees, and which is about four inches above the grade at the same point, fixed by said ordinance, and running thence east on the same level; that in pursuance of said agreement, he set his curbstone south of his west corner at a height so that a flag-pavement at that point will not be higher than agreed to by said trustees; that he set all his curbstone in front of his property, and has laid a part of his flagstone pavement, commencing on the east line of his building, and finds it to be on the south edge, or curbstone, at that point three inches above the level as agreed upon at the curbstone opposite the west line of said building; and thus making a descent from east to west, in a distance of forty-five feet, of three inches; which cannot, in anywise, be detrimental to said town, or to any property holder or any citizen thereof; wherefore he prays judgment."

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The first paragraph of the answer presents the same question as that which we have already considered in passing upon the sufficiency of the complaint, and what we have said is decisive against such paragraph of the answer.

Counsel for appellant do not claim that the second and third paragraphs of the answer are good. The most that is claimed is, that they are good enough for a bad complaint.

Having reached the conclusion that the complaint is good, we must hold that there was no error in sustaining the demurrer to them.

The judgment is affirmed, with costs.

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140	185

INJUNCTION.—Appeal.—City.—A party cannot enjoin the collection of a fine and costs, assessed for the violation of a city ordinance, on the ground of there being no offence charged or cause of action filed before the mayor. The remedy in such case is by appeal.

From the Jefferson Circuit Court.

J. L. Wilson and *E. R. Wilson*, for appellant.

V. Kirk, for appellees.

DOWNEY, J.—The only question in this case is as to the sufficiency of the complaint, to which a demurrer was sustained in the circuit court.

On the 18th day of December, 1873, complaint was made of Schwab, before the mayor of the city of Madison, as follows:

“The State of Indiana, Jefferson County, ss. }
 “ The City of Madison. } ”

“Before me, John Marsh, mayor of the city of Madison and *ex officio* a justice of the peace in and for said city and county, personally came John W. Grayson, who, being duly

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sworn, deposeth and saith that, on the 18th day of December, 1873, at said city and county, William Schwab, as affiant verily believes, did commit an act of public indecency in Spring Dale Cemetery Graveyard.

JOHN W. GRAYSON.

"Subscribed and sworn to this 18th day of December, 1873.

"JOHN MARSH,

"Mayor and *ex officio* Justice of the Peace."

On this affidavit, an action was commenced in the name of the city of Madison against said Schwab. He was arrested and taken before the mayor, when the following from the docket of the mayor shows how the case was disposed of:

"The defendant being arraigned for trial, the court, after hearing the allegations of plaintiff in case, and being sufficiently advised in the premises, assess fine, the city, at the sum of five dollars, and it is adjudged that he pay the costs of this prosecution, and stand committed until fine and costs are paid or replevied.

JOHN MARSH,

"Mayor."

On this judgment, an execution was issued by the mayor to the city marshal, who levied the same on personal property of Schwab. Thereupon Schwab instituted this action to enjoin the city and the marshal from collecting the amount of the judgment and the costs.

It is averred in the complaint, "that the proceedings and judgment before the mayor are void, because there was no crime or offence charged against the plaintiff or cause of action filed against him before the mayor, showing any liability to the city or authorizing the fine and costs to be adjudged against him; and that said execution so issued is void, and the seizure of the property of the plaintiff by the marshal is without authority of law."

Counsel for appellant urge the objection to the mayor's proceedings mentioned in the complaint, and also insist that the judgment of the mayor is not sufficient in form to warrant the issuing of any execution.

The only ground of complaint alleged, as we understand the pleading, is the insufficiency of the complaint before the mayor.

It is true, that the complaint in this case alleges that "said execution so issued is void, and the seizure of the property of the plaintiff by the marshal is without authority of law." But we understand that these are stated merely as consequences of the insufficiency of the affidavit. If anything else was intended, it should have been stated why the execution was void. To state that it is void, is merely to state a legal conclusion without stating the facts. This is not very material, perhaps, since, if the judgment is informal, it may, we presume, be amended on proper application to the mayor.

The execution, if issued without a judgment authorizing it, might be set aside on motion in the mayor's court; and perhaps this was the only remedy. See *Lasselle v. Moore*, 1 Blackf. 226, and *Stockwell v. Walker*, 3 Ind. 384.

No mention is made in the complaint of any defect in the judgment, and we shall not go outside of the complaint in deciding the case.

It seems to us quite clear that the affidavit was so defective that the prosecution might have been dismissed on that account. No copy of the ordinance, or section of the ordinance violated, was set out in the affidavit or complaint, as is required where the affidavit or complaint does not conform to sec. 19, 3 Ind Stat. 69; nor does the affidavit conform to that section, by stating "the number of the section charged to have been violated, with the date of its adoption." See *Green v. The City of Indianapolis*, 22 Ind. 192; *Green v. The City of Indianapolis*, 25 Ind. 490; *Whitson v. The City of Franklin*, 34 Ind. 392. But this does not dispose of the question presented.

Does the defect in the affidavit render the judgment void, so that an execution upon it cannot be collected, but may be enjoined? The appellant made no objection to the affidavit before the mayor, but suffered judgment to be rendered upon it without any objection thereto. He had a right of appeal, had the question been made and decided against him by the mayor. He now objects to the sufficiency of the affidavit and to the validity of the judgment thereon, in a collateral proceeding. The question is, can he be heard now and in this

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way to make the objection? The subject-matter was one of which the mayor might exercise jurisdiction, if there was an ordinance on the subject, and we may well infer that the existence of the ordinance was shown on the trial, and also the violation of it by the appellant. The mayor's court had jurisdiction of the person of the appellant, for he was arrested and brought into court to answer to the charge.

We think the judgment should not be enjoined. The appellant had a plain, adequate, and sufficient remedy by appeal for any errors in the proceedings and judgment of the mayor. We do not think the judgment is void.

The judgment is affirmed, with costs.

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128	465

 CHAMBERLAIN ET AL. v. REID.

CONTINUANCE.—*Sufficiency of Affidavit.*—An affidavit for a continuance, filed on behalf of defendants, on the ground of the absence of a defendant who was also a witness, showing that he was not present at the calling of the cause, but not showing that he would not or could not be present at and during the trial, or that any diligence had been used by himself or his codefendants to secure his attendance, and giving no reason for his absence, was insufficient.

SURPRISE.—A party cannot claim that he has been surprised by evidence that has been legally and properly given under the issues formed in a cause. He must be held to know what evidence may be given under the issues formed, and must be prepared to meet it.

From the Floyd Circuit Court.

G. V. Hawk, W. W. Tuley, and M. C. Kerr, for appellants.
A. Dowling, for appellee.

PETTIT, J.—This suit was brought by the appellee, John M. Reid, against Jacob G. Chamberlain, William Mathers, Gustavus Ricker, and Edward W. Stephens, on a contract for

furnishing the materials and constructing certain sections of the Louisville, New Albany, and St. Louis Air Line Railroad.

The answer was, 1. The general denial. 2. Payment in full. Reply in denial.

The case was dismissed as to Ricker. Trial by the court, finding for the plaintiff against Chamberlain and Mathers, and on account of bankruptcy, and by consent of the parties, there was finding and judgment for Stephens.

Over a motion for a new trial by Chamberlain and Mathers, there was judgment against them on the finding for fourteen thousand eight hundred dollars.

There is no question raised on the pleadings. Overruling the motion for a new trial presents the only question. On the calling of the cause for trial, the defendants moved for a continuance, and filed and presented the following affidavit in support of the motion :

“George V. Howk, on behalf of the defendants in this action, makes oath and says that he is one of the attorneys of the defendants herein, and as such has had the management of the defence of this action; that, as affiant believes, the defendants cannot safely try this action without the personal presence and testimony of the defendant William Mathers at such trial; that the said William Mathers acted for and on behalf of the defendants herein during the progress of the work in plaintiff's complaint mentioned, and was, and is now, more fully cognizant of all the matters in controversy in this action than either of his co-defendants; that for this reason his personal presence in court during the progress of the trial, for the purpose of consultation, suggestion, and advice, was and is absolutely indispensable to the defendants' attorneys, and to secure the defendants in a full, fair, and safe trial of this action; that the said William Mathers is also and will be a material witness for the defendants on the trial of this action; that affiant believes the said William Mathers, as such witness, will prove that after the plaintiff had performed his contract as stated in his complaint, and after a final estimate of his said work was made by engineers Charles W. Boyden and John

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M. Bullock, on or about the 29th day of September, 1871, showing a balance then due the plaintiff from the defendants under said contract, in money and bonds, of thirteen thousand nine hundred and sixty-five dollars and fifty-six cents, a controversy arose between the defendants and the plaintiff about the correctness of said final estimate ; that in settlement of said controversy, and as a compromise thereof, it was then agreed between the plaintiff and the defendants that the plaintiff's work under said contract should be remeasured by other engineers, to be selected for that purpose ; that such remeasurement should be final, and both the plaintiff and the defendants would agree to and abide by it ; that, accordingly, E. B. Cozens and W. L. Brigdon were selected as such engineers to make such remeasurement of said work, so made as aforesaid ; after making the plaintiff all proper and reasonable allowances, there was found to be due the plaintiff from the defendants, under said contract, in money and bonds, no greater sum than the sum of three thousand five hundred dollars ; and that the defendants were ready and willing to pay, and, in fact, offered to pay the plaintiff the sum of three thousand five hundred dollars so found due him from the defendants as aforesaid by the said remeasurement of said work ; that affiant and the defendants believe the said facts, above recited as to be proved by said William Mathers as such witness, to be true ; that the defendants cannot prove the said facts by any other witness, whose testimony can be as readily procured ; that the said William Mathers resides near Mount Vernon, Columbiana county, Ohio ; that the defendants believe they can procure his testimony and his personal presence in court at the trial of this cause by the next term of this court ; that when this action was called for trial in its order, on the 7th day of the present term, to wit, on the 24th day of November, 1873, the said William Mathers was not present in court ; that, as affiant is informed and verily believes, the said William Mathers fully intended to be present in court at the said calling of said cause in its order, and during the trial thereof, at the present term, and that his absence at the time was una-

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voidable and wholly unintentional ; that affiant believes that the said absence of said William Mathers was not procured by the act or connivance of the defendants, nor by others at their request, nor with their knowledge or consent ; and that this affidavit is not made for delay merely, but to enable the defendants to obtain substantial justice at the trial of this action, and further says not."

This affidavit shows, that at the calling of the cause, Mathers, a defendant and witness, was not present, but it does not show that he could not, or would not, be present at and during the trial, or that any diligence had been used by himself or his co-defendants to secure his attendance ; nor is there any reason or cause given for his absence. The affidavit was clearly insufficient. But we will add that the bill of exceptions clearly shows that during the trial, and while the plaintiff's witnesses were being examined, Mathers was present, and that certain papers were then and there tendered to him in open court.

One of the causes for a new trial was surprise at certain evidence given, and the following affidavit of the absent witness was filed in support of this cause :

" The said William Mathers makes oath, and says, that upon the trial of this action at the present term, the defendants were taken by surprise by the evidence of said John M. Reid, and one Roland J. Dukes, who testified as witnesses on behalf of the plaintiff herein ; that when the plaintiff's final estimate to September 30th, 1870, of the work and materials furnished by him under the contract sued on in this action was made by Charles W. Boyden and John M. Bullock, the firm of Chamberlain, Mathers & Co., then composed of the defendants, Chamberlain and Mathers, refused to receive the plaintiff's said work in its then unfinished condition, and demanded a remeasurement of said work ; that as a compromise of this difference between the plaintiff and Chamberlain, Mathers & Co., it was verbally agreed, in October, 1871, by and between the plaintiff and said firm, that the said firm should receive the plaintiff's said work in its then condition ; that the said

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work should be remeasured by disinterested parties; that such remeasurement should be final, and that both the plaintiff and said firm would agree to and abide by said remeasurement; that accordingly the said Chamberlain, Mathers & Co. did accept and receive the plaintiff's said work, and in pursuance of said verbal agreement the said Roland J. Dukes, on or about October 25th, 1871, on behalf of said plaintiff, selected and appointed one H. B. Cozzens to make such remeasurement of plaintiff's said work, in connection with an engineer to be appointed by said Chamberlain, Mathers & Co.; that thereupon the said Chamberlain, Mathers & Co. did select and appoint one W. L. Brigdon, who was shown by the testimony of said Roland J. Dukes on the trial of this cause to be a competent engineer, to act in connection with said H. B. Cozzens in making the said remeasurement of the plaintiff's said work; that the said H. B. Cozzens and W. L. Brigdon, so selected and appointed as aforesaid, did make such remeasurement of said work, and reported the same to the said Roland J. Dukes; that by such remeasurement it was shown, that the said Chamberlain, Mathers & Co. only owed the said John M. Reid, on account of his said work and at the date of said final estimate, the sum of three thousand five hundred dollars, instead of the sum sued for in this action, and found to be due the plaintiff from the defendants on the trial of this cause; that the defendants never knew, or heard, or believed that the said Roland J. Dukes refused to approve of said remeasurement, or that he had not ordered such remeasurement of said work, until he so testified on the trial of this cause; that the defendants never knew, or heard, or believed, that the said John M. Reid denied, or would deny, his agreement as aforesaid to the said remeasurement of his said work, until he so testified on the trial of this cause; and that the defendants were taken by surprise by the testimony of the plaintiff and of said Roland J. Dukes, on the points aforesaid. And affiant further says, that if the defendants had any reason to believe the plaintiff would deny under oath his said agreement to such remeasurement, or that the said Rol-

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and J. Dukes would deny under oath that he had authorized and directed the said remeasurement of said work, the defendants would have been prepared to prove on said trial, by the testimony of said Jacob G. Chamberlain, H. B. Cozzens, and W. L. Brigdon, all of whom were and are competent witnesses for the defendants, the facts aforesaid in relation to the plaintiff's said agreement and the said remeasurement of the said work, and the plaintiff's agreement in relation thereto, and the acts and directions of the said Roland J. Dukes, in relation to said remeasurement; and that affiant believes all the facts aforesaid, in relation to plaintiff's said agreement and the said remeasurement of said work, to be true."

The evidence, by which the defendants below claim that they were surprised, was called out from the witnesses of the plaintiff by the defendants on cross-examination, and was clearly within the law and rules of cross-examination under the issues in the case.

A party cannot claim that he was surprised by evidence that is legally and properly given under the issues formed in a case. He must be held to know what evidence may be given under the issues formed, and to be prepared to meet it. *Pauley v. Short*, 41 Ind. 180; *Brownlee v. Kenneipp*, 41 Ind. 216.

The evidence clearly and fully required the finding and judgment of the court below, and there is no legal cause or reason shown to us by the record why the judgment should be reversed.

The judgment is affirmed, at the costs of the appellants, with five per cent. damages.

Davidson v. King *et al.*

DAVIDSON v. KING ET AL.

REVIEW OF JUDGMENT.—Interest on Judgment.—A judgment by default rendered on a promissory note bearing ten per cent. interest, when by the statute interest on judgments could not exceed six per cent., provided that the judgment should bear ten per cent. interest until paid.

Held, that a complaint to review such judgment would lie, because of such provision therein.

SAME.—Pleading.—Sheriff's Return.—In a proceeding to review a judgment on a promissory note and decree of foreclosure of a mortgage given to secure it, the sheriff's return upon the order of sale under such decree is not a part of the complaint, though a copy thereof be filed with it.

SAME.—Attorney's Fee.—Pleading.—Where a complaint on a promissory note does not contain an averment of an amount claimed and reasonably due as attorneys' fees, but the note filed with the complaint stipulates for the payment of attorneys' fees if suit should be instituted thereon, and the sum for which judgment is demanded is large enough to cover the judgment rendered, the judgment taken by default will not be reviewed because it allows an amount for attorneys' fees.

From the Marion Civil Circuit Court.

S. Claypool, J. L. Mitchell, W. A. Ketcham, C. Baker, O. B. Hord, and A. W. Hendricks, for appellant.

J. T. Dye and A. C. Harris, for appellees.

DOWNEY, J.—This is a complaint to review a judgment, and there was a demurrer sustained to it in the circuit court. There was an exception taken to the ruling, and it is the error of which complaint is made here. The facts may be stated without setting out the complaint in full :

Vance, one of the appellees, held two promissory notes against the appellant, one dated August 25th, 1868, and the other dated October 8th, 1868, by each of which she agreed to pay a designated sum of money, and attorneys' fees if suit was instituted on the notes. A separate mortgage on real estate was given to secure each of the notes. After the maturity of the notes, Vance foreclosed the mortgages in one action, the judgment embracing an amount for attorneys' fees, and the court adding to the judgment the words : " Said judgment to bear ten per cent. interest until paid." The judgment was

by default. A copy of the notes, etc., was filed with each paragraph of the complaint, and referred to in this way: "A copy of which is filed herewith, together with a copy of the mortgage, amounting to one thousand dollars and interest, and attorneys' fees, which yet remains unpaid, though due."

The prayer of the complaint was for five thousand dollars, on both paragraphs, and for foreclosure of the mortgages, sale of the mortgaged premises, etc. After the rendition of the judgment, it was sold and assigned by Vance to King, the other appellee. King caused a certified copy of the judgment to be issued to the sheriff, the mortgaged premises were sold, and he became the purchaser. The errors in the judgment, for which it is claimed it should be reviewed, are:

1. The order of the court that the judgment shall bear interest at the rate of ten per cent.; and,
2. That the amount of the judgment is excessive, on account of the allowance of an amount for attorneys' fees.

At the date of the judgment, there was no statute authorizing interest on judgments at a greater rate than six per cent., although a higher rate was contracted for in the instrument on which the judgment was rendered. Such a statute was passed and approved February 5th, 1873. Acts 1873, p. 158. Counsel for appellee seek to avoid this objection to the judgment by stating that interest on the judgment was computed by King at the rate of six per cent. only, and that he receipted the judgment in full, calculating the amount on that basis. This does not appear in the complaint. It is claimed, however, that it appears in the sheriff's return to the execution, a copy of which is filed with the complaint. That is no part of the complaint. *Knight v. The Flatrock, etc., Co.*, 45 Ind. 134, and cases cited. We think the ground of objection to the judgment is well taken. It was clearly wrong for the court to provide that the judgment should bear interest at ten per cent., when by statute interest on judgments could not exceed six per cent. 2 G. & H. 656, sec. 3; *Berry v. Makepeace*, 3 Ind. 154.

We do not think the other ground of objection such as

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should reverse the original judgment. Strictly, there should be an averment in the complaint of the amount claimed and reasonably due for attorneys' fees. The notes, however, stipulated for the payment of the attorneys' fees, and the sum for which judgment was demanded was large enough to cover the judgment rendered. See *Roberts v. Comer*, 41 Ind. 475; *Smiley v. Meir*, 47 Ind. 559. It is true that the relief granted, if there be no answer, cannot exceed that demanded in the complaint. 2 G. & H. 220, sec. 380. But here the relief demanded was a judgment for five thousand dollars, and the judgment was for less than that amount. There was, therefore, no violation of the section cited.

The complaint for review prays, also, that the sheriff's sale be set aside, on account of the alleged errors in the judgment. The statute provides that upon the hearing of the complaint, the court may reverse or affirm the judgment, in whole or in part, or modify the same as the justice of the case may require, and award costs according to the rule prescribed for the awarding of costs in the Supreme Court, on appeal. 2 G. & H. 281, sec. 591. Under this section, the circuit court can reverse that part of the judgment providing for the payment of ten per cent. interest on the judgment, and affirm it as to the residue. Whether this will have any effect upon the sheriff's sale of the mortgaged premises, probably we need not now decide. But, as at present advised, it seems to us that if the interest illegally allowed did not form any part of the amount for which the mortgaged premises were sold, it would not affect the legality of the sale.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings.

FISHER v. HAMILTON.

MALICIOUS PROSECUTION.—*Surety of the Peace.*—An action will lie for having, without probable cause and maliciously, instituted a prosecution for surety of the peace.

SAME.—*Pleading.*—*Copy of Proceedings.*—In an action for malicious prosecution, filing with the complaint a copy of the proceedings in the case alleged to have been prosecuted maliciously does not make such proceedings a part of the complaint.

RETURN ON WRIT FOR ARREST.—A writ for the arrest of a party, issued by a justice of the peace and returned, "served as commanded, and the defendant is present," shows the arrest of the party.

TRANSCRIPT.—*Authentication.*—*Justice of the Peace.*—A certificate of a justice of the peace to a transcript from his docket, that it is a true and correct transcript of the proceedings had before him in the cause, together with a true copy of all the papers in the case, given under the hand and seal of the justice, without the certificate and seal of the clerk of the county, is a sufficient authentication to entitle the transcript to be received in evidence in the several courts of this State.

EVIDENCE.—Parol evidence that a person acted as a justice of the peace is admissible to prove him to be such officer, and the authenticity of his jurat may also be proved by parol.

WITNESS.—*Impeachment.*—*Parties.*—Where a plaintiff who had testified as a witness was squarely contradicted by a witness for the defendant, and the plaintiff in rebutting impeached the defendant's witness, by showing that he had made statements out of court different from those testified to on the trial, after which the defendant introduced evidence to show that the character of his witness for morality, truth, and veracity, was good, it was not an abuse of the discretion of the court to then allow the plaintiff to prove his general character for morality and truth and veracity to be good.

SURETY OF THE PEACE.—*Diligence of Person Instituting Prosecution upon Information.*—Where a prosecution for surety of the peace is commenced upon information, the person instituting it should use such diligence as a reasonably prudent man would do under the circumstances to ascertain the truth of his suspicions, but he is not required to go to the person from whom he apprehends violence and inquire what are his intentions.

INSTRUCTION.—*Improper Use of the Word "Testimony."*—Where the court, in an instruction, states to the jury the law arising upon certain facts, if they should be satisfied, from a fair preponderance of the "testimony," that such facts exist, it will not be presumed that the improper use of the word "testimony" has misled the jury.

SAME.—*Statute.*—Where the court, in an action for malicious prosecution, instructed the jury that the statute limited the maximum amount of dam-

49	341
138	14
138	61
49	341
155	55
49	341
157	82

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ages that could be recovered to a certain sum, stating the amount claimed in the complaint;

Held, that the use of the word "statute" instead of "complaint" did not injure the defendant.

DAMAGES.—Malicious Prosecution.—In an action for malicious prosecution, an instruction to the jury that, in assessing damages, the jury might consider every circumstance of the act of arrest and prosecution, and also every act which injuriously affected the plaintiff, not only in his person, but also in his peace of mind and individual happiness, did not authorize the jury to consider circumstances and acts not directly connected with the arrest and prosecution of the plaintiff.

From the Dearborn Circuit Court.

S. R. Downey, D. T. Downey, J. D. Haynes, and J. K. Thompson, for appellant.

W. S. Holman, R. Gregg, and H. D. McMullen, for appellee.

BUSKIRK, C. J.—The appellee by this action sought to recover from the appellant damages for having, without probable cause and maliciously, instituted a prosecution for surety of the peace.

The appellant answered in two paragraphs. The first was the general denial. In the second, he admitted having instituted the prosecution, but justified it. Denial in reply.

Trial by jury, and verdict for appellee in the sum of five hundred dollars. Motion for a new trial overruled, and judgment on the verdict.

The errors assigned are :

1. That the complaint does not contain facts sufficient to constitute a cause of action.
2. That the court erred in overruling the motion for a new trial.

The first objection urged to the complaint is, that it appears therefrom that the appellee was not prosecuted for a criminal offence, and, hence, that an action for malicious prosecution can not be maintained. The point made is, that the proceeding for surety of the peace is a civil and not a criminal proceeding, and that an action for malicious prosecution can only be maintained by a person who has been prosecuted upon a

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criminal charge; and in support of this position reference is made to *M'Neely v. Driskill*, 2 Blackf. 259, and *Turpin v. Remy*, 3 Blackf. 210.

The above cases seem to support the position assumed, but the doctrine there announced was held to be unsound in *Stancliff v. Palmeter*, 18 Ind. 321, where it was held, that three remedies were given for personal injuries inflicted through the instrumentality of alleged prosecutions:

1. Actions of trespass and case for false imprisonment.
2. Actions for malicious arrests, in civil cases.
3. Actions proper, for malicious prosecutions, upon a criminal charge.

A prosecution, under the statute, for surety of the peace is a criminal proceeding to prevent the commission of a crime, but is not a prosecution for a crime. *The State v. Abrams*, 4 Blackf. 440; *The State, ex rel. Greene, v. Maners*, 16 Ind. 175; *Murray v. The State*, 26 Ind. 141; *The State v. Vankirk*, 27 Ind. 121; *Deloohery v. The State*, 27 Ind. 521.

It is objected, in the second place, that it does not appear from the complaint that the appellee was arrested. It is expressly averred therein that he was arrested and taken before the justice of the peace. A copy of the proceedings before the justice was filed with the complaint, and it is claimed that the return of the officer upon the writ does not show an arrest. The filing of a copy of such proceedings did not make it a part of the complaint. *Lytle v. Lytle*, 37 Ind. 281. But if such proceedings constituted a part of the complaint, we think the return showed an arrest. The command of the writ was to arrest the appellee and take him forthwith before the justice. The return was: "17th October, 1871; served as commanded, and the defendant is present."

The writ could not have been served as commanded, unless the appellee had been arrested.

We think the objections urged to the complaint are untenable, and that the complaint is good.

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We next inquire whether the court erred in overruling the motion for a new trial.

The prosecution for surety of the peace was had before Esquire Hemphill, in Ohio county, where the appellee was discharged. The present action originated in that county, and the venue was changed to Dearborn county, where the trial was had. Upon the trial, the appellee offered in evidence a transcript of the proceedings had before Esquire Hemphill, when the appellant objected to its introduction, for the reasons that the transcript is not authenticated as required by law, and the signature and official character of the said assumed justice of the peace are not proved; but the objection was overruled, and the transcript admitted, and appellant entered an exception.

First, was the transcript properly certified? The certificate was as follows:

“State of Indiana, county of Ohio, ss: I, James Hemphill, a justice of the peace in and for Ohio county, do hereby certify that the above is a true and correct transcript of the proceedings had before me in the above entitled cause, together with a true copy of all the papers in the case.

“Given under my hand and seal, this 17th day of February, 1872.

JAMES HEMPHILL, [Seal.]

“Justice of the Peace.”

To which were added these words, under the certificate:

“Complaint on file, if wanted. J. H., J. P.”

The certificate is in the language of section 280, 2 G. & H. 182, except the word “correct” is used instead of the word “complete,” but we think the words “together with a true copy of all the papers in the case,” and that the proceedings which are set out are all that could have taken place in such cause, supply the omission of the word “complete.” *Wiley v. Forsee*, 6 Blackf. 246; *Ward v. Hazlerigg*, 7 Blackf. 46; *Brown v. McKay*, 16 Ind. 484.

Was the transcript properly authenticated? It is argued that it should have been authenticated by the certificate and seal of the clerk of Ohio county. We do not think so. It is

provided, by section 280 of the code, that "copies of the proceedings and judgments of any justice of the peace of this State, certified under his hand and seal, or under the hand and seal of the justice who may have the legal custody thereof, as true and complete copies of such proceedings or judgments, shall be received as evidence in the several courts in this State." See sec. 539, 2 G. & H. 267.

Section 279 of the code, 2 G. & H. 181, relates to the authentication of the copies of proceedings and judgments of justices of the peace in other states or in any territory of the United States.

Section 283, 2 G. & H. 183, does not relate to the proceedings and judgments of justices of the peace.

We think the certificate was properly authenticated.

- It is next claimed that the court improperly admitted in evidence, over objection of appellants, two papers, purporting to be the original affidavit and warrant in the prosecution for surety of the peace. The objections were, first, that the signatures thereto are not proven; second, because no proof has been made that said supposed officer was then a justice of the peace of Ohio county, Indiana, and then so acting. Pending this objection, the appellee called appellant to the stand, and proved his execution of the paper and the authenticity of the *jurat*, and that Esquire Hemphill was, at the time, an acting justice of the peace.

It is claimed that the court erred in admitting parol testimony, and we are referred to *Hagaman v. Stafford*, 2 Blackf. 351, as an authority for such position. It was expressly held in such case, that such proof might be made by parol testimony.

The ruling in the above case has been adhered to in the following cases: *Doughton v. Tillay*, 4 Blackf. 433; *Johnson v. Prather*, 6 Blackf. 411; *Fellows v. Miller*, 8 Blackf. 231; *Dra-per v. Williams*, 8 Blackf. 574.

The case of *Brown v. Connelly*, 5 Blackf. 390, is squarely in point. There it was held, that parol evidence that a person had acted as a justice of the peace was admissible to prove

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him to be such officer. We think the original affidavit and warrant were properly proved and admitted in evidence.

It is next contended that the court erred in permitting the appellee to introduce evidence to prove that his character for morality and truth and veracity was good. The plaintiff introduced his evidence in chief and rested. The defendant then introduced his evidence and rested. The plaintiff then offered his rebutting evidence. The testimony of the plaintiff was squarely contradicted by the testimony of a witness offered by the defendant. The plaintiff, in his rebutting evidence, impeached such witness, by proving that he had made statements out of court different from those testified to on the trial. After the close of the rebutting evidence, the defendant introduced several witnesses and proved the general character of such witness for morality and truth and veracity to be good. The plaintiff then offered several witnesses by whom he proposed to prove that his general character for morality and truth and veracity was good, to which the appellant objected, on the grounds that the plaintiff, being a party, cannot so sustain his character as a witness, and that it was too late to introduce such evidence for that or any other purpose in the case; but the objections were overruled, and the evidence admitted.

The first objection to the competency of such evidence is wholly untenable. Since parties have been rendered competent as witnesses, they occupy a twofold relation to the case, that of parties and witnesses. As witnesses, they are governed by the same rules and regulations as other witnesses. They may, like other witnesses, be impeached and sustained, to the same extent and in the same manner as other witnesses. *Harris v. The State*, 30 Ind. 131; *Seeger v. Pfeifer*, 35 Ind. 13.

We think it was within the discretion of the court to permit the appellee to make such proof at the time it was made, and that there was no such abuse of discretion as would justify us in reversing the case.

The giving of the second, fourth, twelfth, and thirteenth instructions is claimed to be erroneous.

The second instruction is quite lengthy, and contains defi-

nitions of malice and probable cause. This portion is not objected to. The court then says: "In determining the question of probable cause, the jury should inquire in their own minds, in the light of the testimony adduced, what inquiry did the defendant make to ascertain the truth or falsity of the apprehended injury to himself complained of? Did he make inquiry of plaintiff or any one else? Did he use due diligence, before instituting the surety of the peace prosecution, in making such inquiry? These questions must be determined by you from the testimony, and if you find therefrom that he did not, and that he instituted said prosecution maliciously, and without probable cause ascertained to exist, after due inquiry as aforesaid, you should find for the plaintiff, unless such facts constituting such probable cause were known to the defendant of his own knowledge; and in that event inquiry was not necessary."

The objection urged to the instruction is, that the jury were charged that it was the duty of the appellant to inquire of the appellee, before he instituted the prosecution for surety of the peace, whether he had threatened him and attempted to shoot him. We think the jury must have so understood the charge of the court.

The court propounded to the jury the following question: "Did he make inquiry of the plaintiff or any one else?" In a subsequent part of the charge, the court said: "And that he instituted said prosecution maliciously, and without probable cause ascertained to exist, after due inquiry as aforesaid." The due inquiry spoken of necessarily included inquiry of the plaintiff.

The law is quite well settled, that where a prosecution is commenced upon information, the person instituting it should use due and reasonable diligence to ascertain the truth of the charge preferred; and there are cases where the law would require the person preferring the charge to make inquiry of the accused party. Such was the rule laid down in *Lacy v. Mitchell*, 23 Ind. 67, which was a prosecution for larceny of corn. But we do not think that such a rule should be applied in a case like the present.

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The appellant and appellee had, some years previous to the commencement of the prosecution for surety of the peace, quarrelled about a road, and had not been good friends. The appellant was the president of a turnpike company that was engaged in the construction of a road over the land of appellee, who was greatly opposed to the construction of such road. The appellee had been awarded three hundred dollars damages for the appropriation of his land. The appellant delivered said sum of money to Mr. Davis, who had agreed to make a tender of it to the appellee. For that purpose, Davis went to the house of appellee. While Davis was upon the premises, the appellant and another gentleman passed the highway near the house of the appellee. Davis afterward informed the appellant that he came very near being shot; that while he was passing near the residence of appellee, he had a gun pointed at appellant, and that he was prevented from shooting by his daughter.

There was also evidence tending to prove that the appellee had said that if he could not prevent the construction of such turnpike through his farm by fair means, he would by foul means.

The prosecution for surety of the peace was based upon the grounds that appellant feared that appellee would injure him by violence, and would injure his property. While it was the duty of the appellant, by reasonable inquiry, to satisfy himself that he was in danger of being injured by violence, or of having his property injured, we think he was not required to expose himself to danger by inquiring of the man whom he feared whether he had attempted to shoot him, and whether he intended to injure him by violence, or injure his property. Such a requirement would be unreasonable and dangerous. The appellant was not thus required to hazard his person, life, or property. This would render nugatory a prosecution for surety of the peace, which is designed to prevent, and not to incite, violence.

Exception is taken to the following portion of the fourth charge :

“The jury may infer malice when they are satisfied, from a

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fair preponderance of the testimony, that there was a want of probable cause for the prosecution of the plaintiff, but they are not bound to do so."

The principal objection urged to the above instruction is, that the court used the word "testimony" instead of "evidence," but we do not think the jury were misled by the improper use of the word "testimony."

The twelfth instruction related to the measure of damages, and was as follows:

"If the jury find, from a fair preponderance of the evidence in the case, that the defendant instituted the prosecution for surety of the peace before Esquite Hemphill against plaintiff, as charged in the complaint, maliciously and without probable cause, you should find for the plaintiff in any sum you may agree upon, not exceeding five thousand dollars. The statute provides that the damages recovered in such cases shall not exceed that sum, though it may be as low as one cent."

Objection is made to the last sentence in the instruction. There is no statute limiting the amount of recovery in such a case. The amount of damages claimed in the complaint was five thousand dollars. The recovery could not exceed the amount claimed. As the jury were limited to five thousand dollars, we cannot see how the appellant was injured by the use of the word "statute" instead of "complaint."

The thirteenth instruction is as follows:

"In the event you find for the plaintiff, in fixing the amount of the damages, you may take into consideration every circumstance of the acts of his arrest and prosecution, and also every act which injuriously affected the plaintiff not only in his person, but his peace of mind and individual happiness."

It is claimed that, under the above instruction, the jury were authorized and, in fact, did take into consideration the injury which the plaintiff had sustained by the construction of the gravel road through his farm. We do not think it was subject to any such construction. The circumstances and acts which were to be taken into consideration were limited to the arrest and prosecution of the appellee. We think the charge was correct.

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The material and controlling question in the case was, whether the appellant had probable cause for instituting the prosecution for surety of the peace. It is very obvious that the second instruction injuriously affected the appellant; for by that the jury were told that in determining the question of whether there was probable cause, they should consider whether the appellant had ascertained by inquiry of plaintiff whether he had threatened to injure him or his property, and whether he had attempted to shoot him and was prevented from so doing by the interference of the daughter of the appellee. As we have seen, the appellant was only required to use such diligence as a reasonably prudent man would use under such circumstances, to ascertain the truth of his suspicions, and that it would be an act of foolhardiness, which means courage without sense or judgment, and mad rashness, for a person who apprehended personal violence from another to go to such person and inquire what his intentions were. If he should go unarmed, he would place himself at the mercy of his enemy, and if he went armed, the chances would be that he would precipitate a difficulty, instead of avoiding one, as was the manifest purpose of the statute. For this error the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded for a new trial in accordance with this opinion.

 IRWIN, ADM'R, ET AL. v. HUBBARD.

STATUTE OF FRAUDS.—*Parol Agreement to Change Mortgage.*—A parol agreement between a mortgagor and mortgagee and a third person that an indemnifying mortgage of real estate held by the mortgagee should be changed by inserting therein a provision that such third person should also be indemnified, as surety for the mortgagor, was equivalent to an agree-

49	350
145	205
145	571

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ment to execute a new mortgage, and was within the statute of frauds, and could not be enforced by such third person.

SAME.—Part Performance.—Fraud.—The fact that such third person, in consideration of the promise to so change the mortgage, signed a bond as surety for the mortgagor, was not such a part performance of the agreement, nor was the refusal on the part of the mortgagor to change the mortgage such a fraud, as to take the case out of the statute of frauds.

From the Bartholomew Circuit Court.

S. Stansifer, for appellants.

R. Hill and *J. W. Morgan*, for appellee.

WORDEN, J.—The original action in this case was commenced by William W. Herod against the appellants herein, who, except Irwin, were the heirs at law of Milton Treadway, deceased. The action was brought to foreclose a mortgage on certain real estate, which the deceased in his lifetime had executed to Herod, to indemnify and save him harmless from a liability which he had incurred by executing a certain promissory note, as the surety of the deceased, to one Joseph D. Sidener.

The appellee, Hubbard, on his petition, was made a party to the action, and filed his cross complaint as follows, viz.:

“Charles A. Hubbard, having heretofore been by leave of the court admitted as a party defendant herein, for his answer and cross complaint herein says that after the execution and delivery of said mortgage to plaintiff, one Kendall M. Hord instituted an action against said Milton Treadway before one George W. Arnold, a justice of the peace of said county, wherein such proceedings were had that, on the 24th day of February, 1873, said Hord obtained judgment against said Treadway for the sum of one hundred and seventy-seven dollars and sixty-two cents, together with costs, taxed at two dollars and forty-five cents, from which judgment said Treadway, being desirous of taking an appeal to this court, applied to said Hubbard to become his surety on an appeal bond, for the purpose of so appealing from said judgment as aforesaid, and informed said Hubbard that said Herod held the mortgage now sued on, and that the property covered by said mortgage

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was amply sufficient to secure the sum for which said Herod had taken the same, and also the liability which said Hubbard would incur by becoming surety on said appeal bond, and that if said Hubbard would become surety on said appeal bond, he would arrange with said Herod that said mortgage should be so changed that said Hubbard should be included therein; and by the terms thereof, as so changed, said Hubbard should be fully indemnified for any loss he might sustain by reason of becoming surety on said appeal bond, as aforesaid. And thereupon said Hubbard and said Treadway went together to said Herod, and it was then and there mutually agreed between said Herod, said Hubbard, and said Treadway, that said mortgage should be so changed as to insert therein a provision that said Hubbard should be indemnified for and on account of any loss or damage that said Hubbard might sustain by reason of said appeal bond and his connection therewith; and that such verbal changes should be made in said mortgage as would be necessary and proper to set forth the said security and indemnity of said Hubbard by said mortgage, in fit and appropriate language; and said Herod being learned in the law, at the earnest solicitations and request of both said Treadway and said Hubbard, undertook and promised to make such changes in said mortgage immediately thereafter as would set forth said security; and said Hubbard, relying upon said promises and believing that said change had been or immediately would be made in said mortgage, executed said appeal bond pursuant to said request of said Treadway, and said cause was appealed to this court, where judgment was finally rendered in said action in favor of said Hord, for ———dollars and costs, taxed at ——— dollars; and by reason of his said suretyship on said bond, said Hubbard was compelled to and did pay the sum of two hundred and ten dollars and forty cents. Said Hubbard avers that said Treadway departed this life on the — day of —, 1873, and that said Irwin is administrator of his estate, and that the other defendants herein are heirs at law of said Treadway, and that the estate of said Treadway is wholly insolvent; wherefore said Hubbard prays that

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said mortgage be so reformed as to set forth said agreement of said parties in regard to the indemnity of said Hubbard as aforesaid, and that said mortgage when so reformed be foreclosed, and that said premises be sold to satisfy the indebtedness of said Herod and said Hubbard, or such *pro rata* part thereof as the proceeds of such sale may amount to, if insufficient to satisfy the whole of both said claims, and for all other proper relief."

To this cross complaint the administrator demurred for want of sufficient facts, but the demurrer was overruled, and an exception was taken. Such further proceedings were had as that the mortgage was foreclosed in favor of Herod, the original plaintiff, and changed in favor of Hubbard, in accordance with the agreement alleged in the cross complaint, and foreclosed in his favor, giving Herod priority. Herod, therefore, has no interest in this appeal.

The administrator assigns for error the overruling of his demurrer to the cross complaint, and the heirs that the cross complaint does not state facts sufficient, etc. Thus the sufficiency of the cross complaint of Hubbard is questioned here.

The agreement to so change the mortgage which Herod held against Treadway as to render it a security in favor of Hubbard, to indemnify him against the liability he was about to incur by entering into the appeal bond was, so far as the statute of frauds is concerned, equivalent to an agreement to execute a new mortgage. That the agreement was within the statute of frauds, we think, admits of but little controversy. Browne Stat. Frauds, sec. 267. The author, at the section cited, says: "Not only is an agreement to execute a mortgage invalid without writing, but also an agreement to make a defeasance to an absolute conveyance, or to convert a written mortgage into a conditional sale."

In the case of *Clabaugh v. Byerly*, 7 Gill, 354, it was held, that "a mere parol agreement to execute a mortgage is one of which a court of chancery can take no notice, and, of course, cannot regard it as performed."

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In 3 Powell Mort. 1050c, it is said: "To put a case of pure oral contract—if A. agree with B. in presence of their common solicitor, to make a mortgage for a sum which B. advances, or for a debt due from A. to B., and A. delivers to the solicitor title deeds to assist him in preparing the mortgage, which is prepared accordingly, yet A. may resist specific performance of his contract, and B. will have no relief in equity."

In *Curle's Heirs v. Eddy*, 24 Mo. 117, it was held, that an oral agreement to the effect that real estate, the title to which had been previously taken as a security, should stand as a security for further advances, is within the statute of frauds and consequently void.

So, in *Castro v. Illies*, 13 Texas, 229, it was held, that a parol agreement that certain real estate should be substituted in a mortgage for certain other real estate described therein is void under the statute of frauds. See, also, *Williams v. Hill*, 19 How. 246, 250.

We do not understand that counsel for the appellee insist that the contract is not within the statute; but they insist that it has been so far part performed as to be taken out by a court of equity, and that the non-performance is such a moral fraud that a court of equity will not permit the appellants to take advantage of the statute. We are not able to see any legal fraud in the case. Treadway failed, perhaps we may say refused, to comply with his contract. If that is such a fraud as would prevent him or his heirs from taking advantage of the statute, the statute itself, in respect to this class of contracts, becomes a dead letter.

Hubbard, doubtless, executed the appeal bond on the faith of the agreement that the mortgage should be so changed as to furnish him indemnity. He relied upon the promise, and the promise was broken. There was no other fraud in the case than such as is involved in all breaches of contract.

The case cannot be distinguished in principle from that of *Montacute v. Maxwell*, 1 P. Wms. 618. There, the defendant had agreed with the plaintiff, before their intermarriage and

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in consideration thereof, that the plaintiff should enjoy all her own estate to her separate use, and had agreed to execute writings to that purpose, and had instructed counsel how to prepare the writings. When they were to be married, the writings not being prepared, the defendant desired that this might not delay the match, and engaged upon his honor that she should have the same advantage of the agreement as if it were writing drawn in form by counsel, and executed. On a bill filed by the wife, the defendant pleaded the statute of frauds, by which "all promises in consideration of marriage, unless signed in writing by the party, are made void." The Lord Chancellor said :

"In cases of fraud, equity should relieve, even against the words of the statute ; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former, in this or such like cases of fraud, equity would relieve ; but where there is no fraud, only relying upon the honor, word or promise of the defendant, the statute making these promises void, equity will not interfere."

This case is in point not only upon the question of fraud, but also upon that of part performance. We take it that when the plaintiff in that action married the defendant, she quite as effectually performed her part of the contract as the appellee in this case did when he signed the appeal bond.

There has been no part performance of the agreement that will take the case out of the statute. The case is certainly no stronger than where the purchase-money has been paid for land, and this has never, of itself, been held sufficient to take a case out of the statute. See, on the general subject, the case of *Sands v. Thompson*, 43 Ind. 18.

We are of opinion that the agreement set up in the cross complaint is void by the statute of frauds, not being in writing, and that no facts are averred that take it out of the statute.

The judgment below in favor of Hubbard, the appellee, is reversed, with costs, and the cause remanded.

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HOLMES v. THE PHOENIX MUTUAL LIFE INSURANCE COMPANY ET AL.

PRACTICE.—*Special and General Finding.*—A finding which purports to be special, but which is not made at the request of any of the parties, can only be regarded as a general finding.

SAME.—*Assignment of Error.*—An assignment of error in rendering judgment for a defendant, and against the plaintiff, presents no question to the Supreme Court.

SAME.—*Motion for New Trial.*—A motion for a new trial on the ground of the improper admission or exclusion of evidence, without designating the evidence admitted or excluded, is too indefinite.

SAME.—That the court erred in the conclusions of law stated upon the facts found, is no ground for a new trial.

SAME.—*Venire de Novo.*—That the court did not find its conclusions of law upon the facts found, is no reason for awarding a *venire de novo*.

SAME.—*Demurrer to Evidence.*—*Assessment of Damages.*—Damages need not necessarily be assessed before a decision on the question of law presented by a demurrer to evidence, but may be assessed afterward, if necessary.

SAME.—*Demurrer to Evidence May be Withdrawn.*—After a party has filed a demurrer to evidence, and before any joinder therein, it is within the discretion of the court to permit the demurrer to be withdrawn.

SAME.—*Argumentative General Denial.*—The sustaining of a demurrer to a paragraph of answer which is merely an argumentative denial, the general denial being also pleaded, is not an available error.

From the Allen Circuit Court.

L. M. Ninde and R. S. Taylor, for appellant.

W. H. Coombs, J. Morris, and R. C. Bell, for appellees.

DOWNEY, J.—Holmes brought his action against the life insurance company, on a policy dated the 14th day of June, 1865, the material facts of which, so far as this action is concerned, are as follows:

“This policy of assurance witnesseth, that the Phoenix Mutual Life Insurance Company, in consideration of the representations made to them in the application for this policy, and of the sum of seventy-six dollars to them paid by Joshua Holmes, and of the annual premium of seventy-six dollars to be paid on or before the 10th day of June in every year during the continuance of this policy, do assure the life of

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Alphonso Benton, of Fort Wayne, in the county of Allen, State of Indiana, in the amount of two thousand dollars, for the term of his natural life. And the company hereby promise and agree, to and with the said assured, well and truly to pay or cause to be paid the sum assured to the said assured, his executors, administrators, and assigns, within ninety days after due notice and proof of interest, if assigned or held as security, and of the death of the said Alphonso Benton, deducting therefrom all indebtedness of the party to the company."

Then follows the usual condition against travelling without the consent of the company, engaging in hazardous employments, intemperance, and death by suicide, capital punishment, or duelling.

"And it is also understood and agreed to be the true intent and meaning hereof, that if the proposals, answers, and declarations made by the said Joshua Holmes, and bearing date," etc., "shall be found untrue in any respect, then and in such cases this policy shall be null and void; or in case the said assured shall not pay the said annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine."

It is alleged in the complaint, that Alphonso Benton departed this life in June, 1869. The action was commenced in February, 1871.

On her application, Harriet Benton, widow of Alphonso Benton, was made a party to the action, and filed an answer and cross complaint, alleging, substantially, that she admits the making of the policy of insurance; that it was in the hands of the plaintiff at the death of Alphonso Benton; that the plaintiff had made the necessary proof of the death of said Alphonso, but alleging that the plaintiff should not have judgment for the amount of said policy, because she says that while said policy was so issued in plaintiff's name, and was at the time of the death of said Alphonso in the possession of the plaintiff, yet the plaintiff has no interest in or right or claim

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to said policy, for the reason that, on the 10th day of June, 1865, in consideration of the payment of a certain premium by said Alphonso, the said company made and delivered to said Alphonso said policy of insurance upon his life; that he directed the same to be issued in the name of the plaintiff; that the plaintiff was not then a creditor of Benton, but he and Benton had business transactions from time to time, and said Benton intended that while said policy should be for the benefit of his wife in the event of his death, yet by having it so made out in the name of the plaintiff he would be able to use it as collateral security in case he should at any time need the indorsement or signature of said Holmes; that when the policy was issued, said Benton presented and delivered the same to her, she being then his wife and now his widow; that at the designated dates, in 1866, 1867, 1868, and 1869, Alphonso Benton paid the annual premium and received the renewal receipt or certificate thereof from the company; that in July, 1869, the plaintiff became surety for said Benton on a note to one Swayne for three hundred dollars, and in 1870 indorsed a note in bank for him for six hundred dollars.

It is further alleged, that at that time Benton was confined to his room from sickness, of which he afterward died; that he directed the policy to be brought to him, as well as the several certificates of renewal, and handed them to the said plaintiff, and directed him to hold the same as collateral security for the liability assumed by him as surety and indorser for him; and further directed that in the event he should be compelled to pay said notes, and he, said Benton, should die, he, the plaintiff, should collect said policy, and, after reimbursing himself, should return the residue to his, said Benton's, wife, the said policy having been taken out and intended for her benefit; but if said debts should be otherwise paid, that he should transfer and hand over to her the policy and renewal certificates; to all of which the plaintiff then and there agreed.

It is then alleged that the company, on the 10th day of June, 1870, in consideration of forty-seven dollars and twelve cents

paid by said Alphonso Benton, executed to him a further certificate of renewal for one year, and that, by said policy of insurance and said several certificates of renewal thereof, the said insurance company insured the life of said Benton in the sum of two thousand dollars. She further alleges that at the time of the issuing of said policy of insurance and the several certificates of renewal, except the last, she had and held the possession of the same, and so held them up to the time said Benton so handed them to the plaintiff as collateral, as hereinbefore stated, and said plaintiff had no knowledge of their existence up to that time; that, in 1870, said Benton fully paid said note in bank, so endorsed by the plaintiff, for six hundred dollars, when the same became due, and thereby released and relieved said plaintiff from all liability by reason thereof; that said Benton died in 1870; that at the time of the issuing of said policy and at the time of his death, she, as his wife, had an insurable interest in his life, and that after his death, in 1870, she fully paid off the note to said Swayne, and thereby released the plaintiff from all liability thereon, yet the plaintiff wrongfully withholds from her the said policy and certificates, and refuses to deliver the same to her; that she and her husband have duly performed and fulfilled all the conditions of said insurance on their part; that no part of the amount of the policy has been paid, and that said sum of two thousand dollars is now due to her from said company; that the plaintiff has no interest in said policy and certificates, and now withholds the same from her with the fraudulent purpose of cheating and defrauding her by collecting the same and appropriating the proceeds to his own use; wherefore, etc.

The insurance company answered the original and the cross complaint, admitting the making of the policy and the renewal certificates as alleged, and stating that it had no knowledge of the business relations between Holmes and Benton, and that it had always been ready to pay the amount of the policy to any person legally authorized to receive the same, and praying an order directing to whom they should make payment.

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The plaintiff demurred to the answer and cross complaint of Harriet Benton, on the ground that the same did not state facts sufficient to constitute a defence, or to entitle her to recover on her cross complaint, and the demurrer was overruled.

The plaintiff answered the cross complaint of Harriet Benton in an answer of three paragraphs :

1. A general denial.

2. That on the 15th day of October, 1863, the plaintiff was the lessee of the Pittsburgh, Fort Wayne, and Chicago Stock Yards, at Fort Wayne, and entitled to take possession of the same, and said Alphonso Benton was then a laborer in said stock yards, in the city of Chicago, and applied to the plaintiff to release his interest in said stock yards first above mentioned, and to use his influence to procure a lease of the same for said Benton, and assist him with the plaintiff's credit to run the same, and that he, said Benton, would pay the plaintiff one thousand dollars therefor; that plaintiff released said company from his said lease, promoted and assisted Benton, who procured a lease thereof from said company, and held the same till the time of his death; that he endorsed the paper of said Benton from time to time; that the policy of insurance was procured to be issued to the plaintiff by said Benton, to secure the plaintiff in the payment of said money, and to compensate him for the time, trouble, and risk always taken and run by him in and about the contract and numerous endorsements so made by the plaintiff for said Benton, which said policy was, when issued, duly delivered by said Benton to plaintiff, with the understanding and agreement that he, the said Benton, would continue to pay up the accruing premiums on the same for the use and benefit of the plaintiff; for the convenience of making said payments, the plaintiff handed said policy to said Benton to hold for him; that the policy was so held by him until the 1st day of June, 1870, when it was handed over by him to the plaintiff, absolutely for his own use.

3. That said Alphonso Benton, at the time said policy was issued, was under obligation to the plaintiff for divers indorse-

ments and accommodations theretofore rendered and done by the plaintiff for him, said Benton, and it was then and there agreed by and between said Benton and plaintiff to be continued from time to time as the same might be convenient or necessary for the business of said Benton, and which agreement to continue to endorse the paper of said Benton the plaintiff faithfully performed by endorsing all the paper which said Benton applied to him to endorse up to his death; and for and in consideration of the premises, the said Benton caused the said policy to issue, and delivered the same to the plaintiff, at the time, for his own use, and agreed to continue to pay the accruing premiums on the same, and the plaintiff deposited the said policy with said Benton for his convenience in making said payments, who kept the same until a short time before his death, when the same was delivered over to the plaintiff, for his own use; wherefore, etc.

The defendant Harriet Benton demurred to the second and third paragraphs of the answer of the plaintiff to her cross complaint, and the demurrer was overruled as to the second, and sustained to the third.

The record contains a demurrer to the evidence, which purports to have been filed by the defendant, but which was afterward, and before any joinder therein, withdrawn by leave of the court.

Following this entry is a reply to the second paragraph of the answer of the plaintiff to the cross complaint, consisting of a general denial thereof.

There was a trial by the court and a finding in favor of Harriet Benton, against the insurance company, for two thousand dollars, and also against the claim of the plaintiff to the proceeds of the policy. The finding is an attempted special finding, but was not made at the request of any of the parties, and cannot be regarded as a legal special finding.

The plaintiff moved the court to award a *venire de novo*, which was refused. He then excepted to the conclusions of law, and also moved the court to grant him a new trial. This motion the court also overruled. He also moved for judgment

in his favor on the special findings, which was also refused, and final judgment rendered according to the finding.

We will consider the errors as they are assigned and numbered:

It is alleged that the court erred in rendering judgment for Harriet Benton and against the plaintiff. This assignment presents no question to this court. If the verdict of the jury or the finding of the court is in favor of a party, and it is not set aside by granting a new trial, or in some other legal manner, judgment follows as a necessary consequence. *Fall v. Hazelrigg*, 45 Ind. 576; *Sanzay v. Hunger*, 42 Ind. 44, and cases cited.

The second alleged error is, that the court improperly refused to render judgment for the appellant on the special finding of the court. We have already said that there was no legal and proper special finding. We have often decided that when an attempted special finding falls short of the statutory requirements, it can be regarded as a general finding only. *Conwell v. Clifford*, 45 Ind. 392, and cases cited.

The third alleged error relates to the refusal of the court to grant a new trial. The causes stated in the motion for a new trial are as follows:

"1. Because the findings of the court are contrary to the evidence, and not supported by the evidence.

"2. Because the findings of the court are contrary to law.

"3. Because the court erred in the admission of improper testimony offered by the defendant Benton, and in the exclusion of proper testimony offered by the plaintiff; to which erroneous rulings the plaintiff at the time excepted.

"4. Because the court erred in the conclusions of law stated upon said facts."

The evidence shows that Alphonso Benton paid all the premiums for the insurance; that all the debts for which the appellant was liable as surety or endorser of Benton were paid, without any damnification of the appellant, and, we think, fairly and fully warranted the finding of the court. Indeed, it seems to us, from the facts disclosed in the evidence, that

the claim of the appellant to the proceeds of the policy is destitute of any merit whatever. We do not see any respect in which the finding is contrary to law, as alleged in the second cause for a new trial.

The third ground for a new trial is not sufficiently definite to enable us to know the action of the circuit court to which it relates. Causes for a new trial, in this form, have been repeatedly adjudged insufficient. So often has this been ruled, and the reasons for the rule stated, that it is unnecessary longer to refer to the cases.

The fourth reason for a new trial is, that the court erred in the conclusions of law stated upon the facts. This is no ground for a new trial. *Smith v. Davidson*, 45 Ind. 396, and cases cited.

The court did not err in refusing a new trial.

The fourth alleged error is the refusal of the court to award a *venire facias de novo*. The grounds of the motion were:

1. That the court had not found all the facts in issue in the cause.

2. Had not found the facts in issue, but only the evidence of such facts.

3. Did not find its conclusions of law upon the facts so found.

4. Had not made a conditional assessment of the damages for or in favor of the plaintiff.

As already appears, the insurance company admitted its liability to pay the money. The substantial and material question in the case was, whether the plaintiff was entitled to the money, or whether Mrs. Benton should recover it. Treating the finding of the court as a general finding for Mrs. Benton, on her cross complaint, we think it was full and complete, and fully justified the judgment which was rendered in her favor.

The third ground of the motion, if true, was no reason for awarding a *venire de novo*.

The fourth ground of the motion, that the court had not

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made a conditional assessment of the damages for or in favor of the plaintiff, was no ground, in any view of the case, for awarding the new *venire*. If this ground has reference to the demurrer to the evidence, which was filed and afterward withdrawn, it cannot be sustained. If the demurrer should not have been withdrawn, still the damages need not necessarily be assessed before a decision on the question of law presented by the demurrer, but may be assessed afterward, if necessary. *Lindley v. Kelley*, 42 Ind. 294.

The fifth alleged error is, that the court erred in the conclusions of law. As there was no valid special finding by the court, no question can be presented with reference to the conclusions of law.

The sixth, seventh, and eighth alleged errors may be considered together. They are as follows:

“ 6. The court erred in sustaining the motion of the defendants below for leave to withdraw their demurrer to the evidence.

“ 7. The court erred in refusing the plaintiff below leave to join in the demurrer to the evidence.

“ 8. The court erred in refusing to pronounce judgment upon the demurrer of the defendants to the plaintiff’s evidence.”

These assignments present the question whether the court may, after a party has filed a demurrer to evidence and before any joinder therein by the other, permit such party to withdraw the demurrer. No ground is shown in the bill of exceptions either for or against the allowance of the application in this case. We think the allowance of such motion was a matter within the discretion of the court, and there does not appear to have been any abuse of the discretion of the court in this case.

The ninth alleged error is the sustaining of the demurrer to the third paragraph of the plaintiff’s answer to the cross complaint of the defendant Harriet Benton.

We have already set forth the third paragraph of the answer in question, and we have come to the conclusion that it amounts

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to no more than an argumentative denial of the claim set up by Mrs. Benton in her cross complaint, and that, therefore, there was no available error in sustaining the demurrer thereto.

The tenth and last alleged error is the ruling of the court in overruling the demurrer of the plaintiff to the cross complaint of Harriet Benton. The cross complaint is already set forth in this opinion. No objection to it is pointed out by counsel for the appellant, and we have not discovered any.

The judgment is affirmed, with costs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1875, IN THE FIFTY-NINTH
YEAR OF THE STATE.

WILLIAMS v. THE STATE.

CRIMINAL LAW.—Evidence.—Falsely Personating Another.—To sustain an indictment under section 26, 2 G. & H. 445, the evidence must show that the money or property obtained by falsely personating another was intended to be delivered to the party personated.

SAME.—Larceny.—Will not Lie for Obtaining Money by False Representations.—An indictment for larceny cannot be sustained, under section 19, 2 G. & H. 442, where the evidence shows that the defendant assumed the name of another person and falsely represented himself to be the person whose name he assumed, and on the faith of such representation obtained the money or property alleged to be stolen.

From the Warren Circuit Court.

J. McCabe, for appellant.

O. A. Buskirk, Attorney General, for the State.

PETIT, C. J.—The indictment in this case was in two counts. The first count was based on sec. 26, 2 G. & H. 445, which reads as follows :

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“Every person who shall falsely personate or represent another, and in such assumed character shall receive any property intended to be delivered to the party so personated, with intent to convert the same to his own use, shall be deemed guilty of larceny, and shall suffer the punishment inflicted on those guilty of grand or petit larceny, according to the value of the property so received.”

The second count was for grand larceny, in the proper form, under sec. 19, 2 G. & H. 442.

There was a trial and verdict of guilty of grand larceny on the second count, and, over a motion for a new trial, judgment on the verdict.

The only question properly before us is as to the sufficiency of the evidence to sustain the verdict. We set out the whole evidence, which is this :

“Isaac N. Taylor sworn testified as follows: My name is Isaac N. Taylor; I reside two miles north of Marshfield, Warren county, Indiana; the defendant, Henry Williams, came to my house between sundown and dark on the 19th of June, 1874, and called me out to the fence and asked if Stephen Briggs had left any money there that day for him, and I answered that he had not; he seemed surprised, and said he was to have done so, and that he did not know how he would get along without it, as he had to pay some debts for hogs purchased, and asked me to let him have twenty dollars; I said, ‘I don’t know you; who are you?’ and he said, ‘I am William Goodwine;’ I supposed he was William Goodwine, and took out a twenty dollar bill—it was so dark I could not see the nought—and handed it to him; he said it was twenty dollars; I thought it was William Goodwine, when I let him have the money; this occurred in Warren county, Indiana, on the 19th day of June, 1874; I would not have let him have the money, if I had not thought at the time that he was William Goodwine; he came there in a buggy, driving a gray team, and went away in a south direction; the money he got of me was a twenty dollar bill, called national currency or

black-backs, and was of the value of twenty dollars, and was my property.

“ Bayard Taylor was sworn, and testified as follows: Am a son of Isaac N. Taylor; I was in the front door of father's house when the defendant drove up on the 19th of June, 1874; the defendant told my brother to tell father to come out, and my father went out to the fence; he asked father if Stephen Briggs had been along there that day, and left any money for him; my father said he had not; he said he should have done so, and asked father to let him have twenty dollars; father then asked him his name; he said, ‘I am William Goodwine;’ he got out of the buggy and faced around so that I could see him full in the face, and I know the defendant there is the same man that I saw at father's; he drove a gray team; father let him have twenty dollars.

“ Joab Taylor was sworn, and testified as follows: Am a son of Isaac N. Taylor; I was at home on the 19th of June, 1874; defendant drove up and told me to tell father to come out; it was kind of dark; I did so, and he asked if Stephen Briggs had been there and left any money for him that day; and father told him no; he then asked father to let him have twenty dollars; father asked him who he was, and he said he was William Goodwine; father took the money out of his pocket and handed it to him; he took it and drove off.

“ Marshall Crompton was sworn, and testified as follows: I live north of Marshfield; the defendant came to my house on the 19th of June, 1874, and called me out and wanted to know if I could change a bill; I know William Goodwine; this defendant is not William Goodwine.

“ Noah Griner was sworn, and testified as follows: I live north of Marshfield, in this county; defendant came along one day last June, I think on the 19th, and called me out, and wanted to know if my father was at home, and I said I had no father, and he said, ‘Oh, yes, this is not the white house;’ and he drove away; he drove a gray team.

“ David Haltz was sworn, and testified as follows: I reside

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in Marshfield, in this county; saw defendant about seven o'clock P. M., on the 19th of June, 1874; I changed a twenty dollar bill for him then; it was a black-back; he told me then that his name was Henry Williams.

"Jesse E. Hedrick was sworn, and testified as follows: I am acquainted with William Goodwine, and this defendant is not him; I know of but one William Goodwine."

The evidence totally fails to sustain or support a finding of guilty under the first count, because it does not show that the money obtained by the defendant from Taylor was intended to be delivered to Goodwine, the party or person personated.

Does the evidence sustain the finding of guilty under the second count of the indictment? The evidence possibly might sustain an indictment for obtaining money by false pretences, under sec. 27, 2 G. & H. 445, but we do not think it does or can sustain the general charge of larceny, under sec. 19, 2 G. & H. 442, which provides as follows: "Every person who shall feloniously, steal, take and carry, lead or drive away the personal goods of another." This section, we think, does not make it larceny to obtain the property of another by fraud, lies, and false representation. We think the evidence did not justify the verdict of the jury.

The judgment is reversed, with instructions to grant a new trial. The clerk will issue the proper order for the return of the prisoner.

ARMSTRONG v. McLAUGHLIN.

WIDOW.—Real Estate of Deceased Husband.—Judgment Lien Attached Before Marriage.—The widow of a judgment defendant, who married him after the lien of the judgment attached, has no claim by virtue of her marriage to real estate sold to satisfy the judgment, and this will be the case, though the original judgment was revived by the administrator of the deceased

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judgment creditor after the marriage, and the real estate sold after such judgment was revived, ten years not having elapsed after the original judgment was obtained, and before it was revived.

ADMINISTRATOR.—Deceased Judgment Creditor.—Execution.—Revival of Judgment.—The administrator of a deceased judgment creditor may have execution upon the original judgment without a revivor; but he may have it revived.

PRACTICE.—Pleading.—Written Instrument.—Where copies of records or written instruments which are not the foundation of a suit or defence, but which may be evidence on the trial, are set out and filed with the pleadings, such copies or the originals cannot be examined for the purpose of aiding or invalidating the pleading.

From the Warrick Circuit Court,

C. Denby, D. B. Kumler, J. Dailey, and ——— Armstrong,
for appellant.

J. S. Moore and L. Wood, for appellee.

WORDEN, J.—Complaint by the appellant against the appellee, for the partition of certain real estate situate in Warrick county, the appellant claiming one-third thereof as the widow of Russell Armstrong, deceased.

The defendant answered that, in October, 1857, one Jonathan Floyd obtained a judgment against said Russell B. Armstrong, in the court of common pleas of that county, for the sum of two hundred and forty-two dollars and costs; that the said Russell B. was at that time unmarried, and that he did not marry the appellant until two months and a half thereafter; that afterward, in October, 1859, Floyd departed this life, and thereupon Simon P. Lowe was duly appointed and qualified as his administrator, and that on March 28th, 1860, Lowe, as such administrator, obtained in said court of common pleas a judgment against said Russell B. Armstrong, reviving the original judgment; that afterward an execution was issued upon the last named judgment, and the real estate described in the complaint was duly and legally levied upon and sold, under and by virtue of said judgment and execution, and William F. Parrett, under whom the defendant claims, purchased the same; wherefore, etc.

A demurrer for want of sufficient facts was filed to this par-

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agraph of answer, but it was overruled, and an exception was taken.

Final judgment for defendant. Error is assigned upon the ruling on the demurrer.

The original judgment was a lien upon all the real estate of the defendant therein situate, in the county where it was rendered, and the lien continued for the space of ten years from the rendition thereof. 2 G. & H. 264, sec. 527 ; 2 G. & H. 25, sec. 24.

If the land is to be regarded as having been sold by virtue of the original judgment revived, the purchaser took it free from any claim of the plaintiff as the widow of the judgment defendant, because he took it by virtue of a lien that attached before her marriage with the judgment defendant. Her marriage with the judgment defendant after the lien of the judgment had attached could not destroy or in any way impair the legal effect of the lien. *Robbins v. Robbins*, 8 Blackf. 174.

The administrator of Floyd might have had execution upon the original judgment without a revivor. 2 G. & H. 528, sec. 155. But notwithstanding this, he was entitled to have it revived. *Wyant v. Wyant*, 38 Ind. 48. Upon these points, the counsel for the parties respectively do not seem to disagree. But it is insisted by counsel for the appellant, as we understand their brief, that the second judgment mentioned in the complaint was not a judgment of revivor of the former one, but a new judgment rendered upon the former one, the original judgment being the foundation of the action in which the new one was rendered. And it is insisted that the land was sold by virtue of the new judgment, rendered since the plaintiff's marriage with the judgment defendant, and, therefore, that her right to the land was not extinguished by the sale on execution. Copies of the original judgment and that which is alleged to have been a judgment of revivor are set out as a part of the answer. The copy of the judgment alleged to have been a judgment of revivor is not such in form, but a judgment "that the plaintiff recover of and from the defend-

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ant the sum of two hundred and forty-two dollars, together with the sum of four dollars and fifty cents costs accrued in a former suit, and the costs of this suit," etc.

Whether or not this should be regarded as substantially a judgment of revivor, though not such in form, we need not determine; nor indeed can we consistently with previous rulings of this court. It is averred in the answer that the judgment obtained by the administrator was a judgment reviving the original judgment. This averment must be taken to be true, and as the judgments pleaded are not the foundation of the defence within the meaning of the statute on the subject of setting out copies of written instruments, we cannot look to the judgments set out, or either of them, for the purpose of aiding or invalidating the pleading. *Keller v. Williams, post*, p. 504. We must take the answer as it stands, without reference to the copy of the judgments set out.

We are of opinion, that the matters alleged in the answer are a bar to the plaintiff's action, and, therefore, that no error was committed in overruling the demurrer thereto.

The judgment below is affirmed, with costs.

LACY v. WEAVER.

PRACTICE.—Supreme Court.—Special Finding.—Where a special finding of facts and conclusions of law is made by the court, the party excepting to the conclusions of law need not move for judgment on the special finding, in order to present the questions arising thereon to the Supreme Court.

LANDLORD AND TENANT.—Rent Payable in Grain.—Replevin.—Where a tenant agreed to give his landlord one-half of the wheat raised on the leased premises, to be delivered to the landlord in the bushel, on the premises, at threshing time, and the tenant only set apart and delivered one-third of the wheat, and retained the remainder under a claim of ownership, without separating the remainder of the landlord's share from his own, replevin would not lie for the landlord to recover the remaining portion of his half.

Lacy v. Weaver.

From the Hamilton Circuit Court.

D. Moss and F. M. Trissal, for appellant.

J. W. Evans and R. R. Stephenson, for appellee.

BUSKIRK, J.—This was an action by appellant against appellee, to recover the possession of two hundred and forty bushels of wheat. The complaint was in the usual form. The appellee answered by a denial.

The cause was submitted to the court for trial, who, at the request of the parties, rendered a special finding of facts, and stated the conclusions of law thereon. The special finding was as follows :

“ That in the fall of 1872, the plaintiff leased by parol to the defendant about seventy acres of wheat land, in Hamilton county, in consideration that the defendant would pay him one-half of the wheat as rent, the wheat to be delivered in the bushel to the plaintiff, on the farm where raised, in the summer or fall of 1873, at threshing time. In pursuance of the contract, the defendant took possession of the land, sowed, harvested, and threshed the wheat crop in the fall of 1873, and delivered to the plaintiff one-third of the same, and refused to deliver any more, under the claim that that was all the plaintiff was to have under the contract. The plaintiff demanded the residue of his half of the wheat from the defendant, and on his refusal to comply with the demand brought this suit. The plaintiff replevied fifty-six bushels of the wheat out of the wagon in which the defendant was hauling it to mill. He then, in company with the sheriff, went to a barn in which several hundred bushels of defendant's wheat was stored, and took out thirty bushels under the writ, which, together with the fifty-six bushels before taken under the same writ, and the one-third delivered by the defendant at the threshing machine, made one-half of the said wheat crop. The court further finds that at the time the wheat was threshed, the defendant set apart and delivered to the plaintiff one-third of the wheat, and no more, and that the wheat replevied, some eighty-six bushels in all, was never delivered or set apart by the defendant, or separated from his own share of the wheat ; but was retained

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by him under a claim of ownership; and that the total value of the wheat replevied is one hundred and seven dollars and fifty-seven cents, and is now in plaintiff's possession under the writ.

"Upon which said facts the court stated its conclusions of law to be, that the defendant is the owner, and entitled to the possession of the wheat; and entitled to the return of the same; and that he recover of the plaintiff one hundred and seven dollars and fifty cents.

"HARVEY CRAVEN. [Seal.]"

The court thereupon rendered a judgment for the return of such wheat; and if the same cannot be returned, a judgment was rendered for the sum of one hundred and seven dollars and fifty cents, and costs.

The appellant excepted to the conclusions of law, and has assigned for error here that the court erred in its conclusions of law.

Counsel for appellee insist that no question is presented for our decision, because there was no motion made for judgment on the special finding of the court. The law is otherwise settled by repeated decisions of this court.

In *Oruzan v. Smith*, 41 Ind. 288, the previous rulings of this court bearing on the point were reviewed, and, upon full consideration, the rule of practice was stated thus: "When a party excepts to the decision of the court, he admits that the facts are correctly and fully found, but says that the court erred in applying the law to the facts found to exist. When a case is thus prepared for this court, there is but a single question of law presented for our decision, and that is, whether the court erred in applying the law to the facts found, and such question is presented for review here by assigning for error that the court erred in its conclusions of law." See *The Montmorency G. R. Co. v. Rock*, 41 Ind. 263.

The court found that the appellant, by the terms of the contract, was entitled to one-half of the wheat raised upon the leased premises; but the court further found, that the wheat was to be delivered in the bushel to the plaintiff, on the farm where raised, at threshing time; that one-third of the wheat

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was set apart and delivered to the plaintiff; that the wheat which was replevied had never been delivered or set apart by the defendant, or separated from his own share of the wheat, but was retained by him under a claim of ownership.

It is quite evident from the facts found that the appellee was guilty of a breach of his contract, and that appellant had a right of action against him for the value of the wheat withheld; but the question which we are required to decide is, whether the appellant could maintain replevin for wheat which had never been delivered to him, and which had never been separated from the other wheat belonging to the appellee. The appellant claimed to be the owner, and entitled to the immediate possession of the wheat. Being the landlord and entitled to one-half of the wheat raised, the appellant had a joint interest with the appellee in the wheat raised, but as the wheat was to be harvested, threshed, and delivered by the appellee to the appellant in the bushel, and there having been no delivery of the wheat, the title thereto remained in the appellee, and hence the appellant was not the owner, and as the wheat claimed by the appellant had never been separated from the other wheat of the appellee, the appellant could not maintain replevin, because he was not entitled to any particular and ascertained portion of the wheat, the title and possession of which remained in the appellee. After the wheat was harvested, it remained the property of the tenant until it was threshed, measured, and one-half of it set apart for the landlord. So the appellant was not the owner or entitled to the possession of any specific or ascertained wheat. *Williams v. Smith*, 7 Ind. 559; *Chissom v. Hawkins*, 11 Ind. 316; *Fowler v. Hawkins*, 17 Ind. 211; *Hart v. The State, ex rel. Baker*, 29 Ind. 200; *Lindley v. Kelley*, 42 Ind. 294.

We invite especial attention to the case of *Lester v. East*, *post*, p. 588, which was an action of replevin, and it was held that the plaintiff could not maintain the action, because there had been no delivery of the hogs, and hence the title remained in the vendor, and the vendee was not the owner or entitled to the possession of any particular or ascertained hogs.

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Counsel for appellant refer us to the following cases: *Chissom v. Hawkins*, 11 Ind. 316; *Matlock v. Fry*, 15 Ind. 483; *Sands v. Taylor*, 5 Johns. 395; *Hammond v. Anderson*, 4 Bos. & P. 69; *Smith v. Surman*, 9 B. & C. 561; *Slubey v. Heyward*, 2 H. Bl. 504.

In *Chissom v. Hawkins*, *supra*, the tenant was to pay as rent one thousand seven hundred bushels of corn. The tenant sold the corn. The landlord brought an action of replevin, and it was held, that the title remained in the tenant; and, as he had sold it to an innocent purchaser, the title passed by such sale, and the action could not be maintained.

The case of *Matlock v. Fry*, *supra*, was an action to recover the possession of standing corn, and the only question was, whether standing corn was personal property, and it was held it was. It does not appear from the opinion, by what right or title the plaintiff claimed to be the owner of the corn. There was nothing decided in that case that has any bearing upon the question involved here.

The case of *Sands v. Taylor*, *supra*, was an action of assumpsit for the value of a cargo of wheat. The entire cargo had been sold, and part delivered, when the purchasers refused to receive the balance, upon the ground that the wheat was unsound. The question in the case was, whether it was a sale by sample, with warranty that the whole corresponded with the sample, or whether it was an absolute sale of all the wheat which had been examined by the purchasers before the sale in the usual way.

The case of *Hammond v. Anderson*, *supra*, involved the right of stoppage *in transitu*. There a number of bales of bacon, then lying at a wharf, having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the purchaser, who went to the wharf, weighed the whole, and took away several bales, and then became bankrupt; whereupon the vendor, within ten days from the time of sale, ordered the wharfinger not to deliver the remainder. By the custom of the trade, the charges of warehousing were to be paid by the vendor for fourteen days

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after the sale. It was held, that the vendee had taken possession of the whole, and that the vendor had no right to stop what remained in the hands of the wharfinger.

The case of *Smith v. Surman*, *supra*, involved the question of whether a sale of timber was within the statute of frauds. The case was fully reviewed and considered in the case of *Owens v. Lewis*, 46 Ind. 488, and need not be further noticed here.

The case of *Slubey v. Heyward*, *supra*, was an action of trover, for a quantity of wheat. Four questions were considered and decided, and they were :

1. What right passes by the indorsement of a bill of lading ?

2. Whether the consignor, after the indorsement of the bill of lading for a valuable consideration, may stop the goods *in transitu*.

3. What shall be deemed the end of the *transitus* ?

4. Whether, when part of the goods have been delivered to the indorsee of the bill of lading, the master of the ship is justified in delivering the residue, after notice from the consignor not to deliver it.

It is quite obvious, that none of these cases or the questions involved have any application to the present case, and need not be stated with greater particularity.

We think the court below committed no error in its conclusions of the law applicable to the facts found.

The judgment is affirmed, with costs.

49	378
128	150

49	378
150	683

HOLLINGSWORTH v. SWEDENBORG ET UX.

PARENT AND CHILD.—The father is entitled to the services of his minor children, or to the proceeds of their labor, if they work for others, while they are supported by him.

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SAME.—The mother has a right to the wages of her infant child, after the death of the father, so long as it remains a member of her family and is being provided for by her

SAME.—*Earnings of Child.*—Where the mother of an infant daughter is married to a second husband, and the daughter does not live with the mother, and is not provided for by her, but is allowed to receive and appropriate to her own use the wages she earns, the mother cannot, in the absence of an express promise to pay her, recover such wages.

From the Tippecanoe Circuit Court.

H. W. Chase, J. A. Wilstach, J. M. LaRue, and S. E. Ball,
for appellant.

W. C. Wilson and J. H. Adams, for appellees.

DOWNEY, J.—Action by the appellees, husband and wife, against the appellant. The facts stated in the complaint are, that the female plaintiff was formerly the wife of one Johnson, who died, leaving a daughter by the said female plaintiff, named Christena; the widow, the female plaintiff, then intermarried with her co-plaintiff, Manuel Swedenborg; the mother entered into an agreement with the defendant that the daughter, then a minor, should work for the defendant for an indefinite time, at two dollars a week, which the defendant agreed to pay to the mother; the daughter worked for the defendant from the 5th day of October, 1867, until the 1st day of August, 1870, in all one hundred and forty-six weeks and five days; that the defendant refused to pay for the same, and still refuses, etc.

Answer, a general denial, with an agreement that all matters which could be properly pleaded might be given in evidence under that issue.

Trial by jury and verdict for the plaintiffs. Motion for a new trial overruled, and judgment on the verdict.

Errors alleged, overruling the motion for a new trial, and that in arrest of judgment.

The daughter testified, with reference to the contract, as follows:

“My mother and Mr. Hollingsworth agreed that I should

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work for him at two dollars per week ; I was present at the contract," etc.

The evidence does not show any express promise on the part of the defendant to pay the wages to the mother, as alleged in the complaint. The evidence shows that the defendant was allowed for clothing, money, etc., furnished to the daughter, so that, although the work would amount to over two hundred and ninety dollars, the verdict and judgment were for only one hundred and fourteen dollars and sixty-five cents. The defendant testified that he had paid the daughter the whole amount due from him. She had got married.

It seems to be settled that the father is entitled to the services of his minor children, or to the proceeds of their labor, if they work for others, while they are supported by him. 1 Bl. Com. 453 ; *Jenison v. Graves*, 2 Blackf. 440. Independent of statutory enactment, there is no legal obligation on a parent to maintain his child. The common law considered the performance of the moral obligation and duty, as better secured by the impulses of our nature than by legal enactments. The duty is one of imperfect obligation, that is, a duty for the enforcement of which the law provided no remedy. In England, except by virtue of an act of parliament in the reign of Elizabeth, there was no remedy provided. By that statute, the duty was enforced by means of an assessment by the justices in quarter sessions, to be paid under a penalty of twenty shillings for every month that the party refused to pay. We have no such tribunal.

Mr. Chitty says : " Independently of the express enactment in the 43 Eliz. c. 2, and other subsequent statutes, there is no legal obligation on a parent to maintain his child, and therefore a third person, who may relieve the latter even from absolute want, cannot sue the parent for a reasonable remuneration, unless he expressly or impliedly contracted to pay." He further says : " Though independently of an express contract, or one implied from particular facts, a father cannot be sued for the price of necessaries provided for his infant son, yet very slight circumstances will suffice to justify a jury in finding a

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contract on his part." Note 1 to p. 448, 1 Bl. Com.; *Kelley v. Davis*, 49 N. H. 187; 1 Cooley Bl. 448, n. 2, and cases cited.

Hence, we think the statement of the rule, with reference to the right of the father to the services of his minor child, making it dependent upon the condition that the child is maintained by the father, must be correct. For if the father does not maintain the child, and is under no obligation enforceable by law to do so, the child must, of necessity, be entitled to its own earnings, or have no means of subsistence. That the father's right is thus conditional upon his maintenance of the child, is expressly decided in *Farrell v. Farrell*, 3 Houst. Del. 633. GILPIN, C. J., says, in delivering the opinion:

"Whilst it is the duty of a father to nourish, support and maintain his minor child, it is equally the duty of such child to obey and serve his father, in all that may be reasonably required of him. These duties are reciprocally binding upon the parties; support and maintenance on the one hand and obedience and service on the other, the one being dependent upon, and compensatory of the other. And, although the general principle is clear and unquestioned, that the father is entitled to the services of his minor child, and to all that such child earns by his labor, yet, it seems to be equally clear, that, as the right of the father to the services of the child is founded upon his duty to support and maintain his child, if he should fail, neglect, or refuse to observe and perform this duty, his right to the services of his child should cease to exist. And such we hold to be the law. I speak here of the civil rights and duties or obligations which belong to the relation of parent and child. Human laws deal with these alone. There are, undoubtedly, other and higher duties of a moral and religious nature growing out of this relation, which are beyond the cognizance of any human tribunal, and with which you, of course, have nothing to do, so far as this case is concerned."

In *United States v. Bainbridge*, 1 Mason, 71, STORY, J., following the language of 1 Blackstone, 453, in substance, says:

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“ By the common law, also, a father is entitled to the benefit of his children’s labor, while they live with him, and are maintained by him but this (as has been justly observed) is no more than he is entitled to from his servants.”

The right of the mother, when left a widow, to the services and earnings of a minor child is more doubtful than that of the father.

In *The O. & M. R. R. Co. v. Tindall*, 13 Ind. 366, where the mother had sued the railroad company for the killing of her son, it was said: “ We think the action maintainable in her name. She was the natural guardian of her infant son, after the death of his father, and as such had the control of his person ; and, as he remained a member of her family, she had a right to his wages.” Here her right was conceded, but placed on the ground, among others, that the son remained a member of her family. Her right is recognized and stated in the same form in *Matthewson v. Perry*, 37 Conn. 435.

In *Gray v. Durland*, 50 Barb. 100, and *Simpson v. Buck*, 5 Lansing, 337, it was decided, the latter case being based on the former, that the mother of an infant child whose father is dead, may maintain an action for the services of the child, in cases in which the father, if living, might have sued.

On the contrary, in *Fairmount, etc., Co. v. Stutler*, 54 Penn. St. 375, it was decided that the mother was not bound for the maintenance of the minor son, and, in consequence, had no implied right to his services. The same was held in *E. B. v. E. C. B.*, 28 Barb. 299.

In *Pray v. Gorham*, 31 Me. 240, it was said, by SHEPLEY, C. J.: “ If it be intended to declare, that the mother, after the death of the father, is entitled to the earnings of a minor child, in the same manner as the father while alive was entitled to them, the position cannot be sustained.” He cites, in support of his statement of the law, 1 Bl. Com. 453; *Commonwealth v. Murray*, 4 Binn. 487; *People v. Mercein*, 3 Hill N. Y. 400; *Morris v. Low*, 4 Stew. & P. 123.

On this point and to the same effect we cite, *United States v. Bainbridge*, *supra*, and *Freto v. Brown*, 4 Mass. 675.

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Hollingsworth v. Swedenborg *et ux.*

It seems to us, that, considering these authorities *pro* and *con*, the right of the mother, at best, cannot be put on any ground more favorable to her than that stated in *The O. & M. R. R. Co. v. Tindall, supra*; that is, that the mother has a right to the wages of her infant child, after the death of the father, so long as it remains a member of her family; which implies, we think, that the child is being provided for by her.

As, in the case under consideration, the daughter was not a member of the family of the mother, or provided for by her, but, on the contrary, appears from the evidence to have been allowed to receive and appropriate to her own use the wages which she earned, she was entitled to such wages, and her mother was not. It may be remarked, also, that in all the cases which we have found, where the mother was held entitled to the services and wages of the minor child, the mother has been a widow. We have found no case where the mother after marrying again has been held to be entitled to the services and wages of the minor children of the former marriage, earned after her marriage.

The stepfather cannot be made liable for the support of his wife's children by a former husband, and there would seem to be no good reason why he should, in an action in her name or in both of their names, recover the wages of the child.

Had the minor daughter lived in the family of the stepfather, and been supported by him, he would have been entitled to her services, unless a contract to the contrary had been made. *Williams v. Hutchinson*, 3 Comst. 312; S. C., 5 Barb. 122.

Had there been an express promise by the defendant to pay the wages to the mother proved, perhaps the rule would have been different.

In *Pray v. Gorham, supra*, it is said: "A minor child may consent to become the servant of the mother, and she may make a contract with another person for his services, as she would for the services of any other person, who had for the time being become her servant, and may in such case recover

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for those services." *Clapp v. Green*, 10 Met. 439, is cited in support of the statement.

The complaint hardly brings the case within the rule thus stated, and we think it was insufficient.

The evidence was not sufficient to justify the verdict of the jury.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the motion in arrest of judgment.

49	384
132	356
49	384
151	77
49	384
166	35

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PARTITION.—*New Trial as of Right.*—In a proceeding for partition between a widow and the heirs of her deceased husband, where certain lands conveyed by the husband to two of his sons are claimed by the sons to have been gifts, and by the widow and other heirs to have been advancements, on a decision adverse to the claim of the sons, they are not entitled to a new trial as of right.

SAME.—*Evidence.*—*Advancements.*—Where a father, in his lifetime, conveyed lands to two of his sons, and after his death they were claimed by the widow and other heirs to have been conveyed as advancements, a conversation with the father several months subsequent to the making of the conveyances, concerning the alleged advancements, is inadmissible in evidence against the sons. Such conversation is inadmissible unless it occurred before or at the time of the transaction, or so immediately subsequent thereto, as to become a part of the *res gestæ*. *Woolery v. Woolery*, 29 Ind. 249, and *Hamlyn v. Nesbit*, 37 Ind. 284, so far as they conflict with this opinion, are overruled.

From the Howard Common Pleas.

N. R. Lindsay, M. Bell, and A. S. Bell, for appellants.

D. Turpie and H. D. Pierce, for appellees.

BIDDLE, J.—Petition for partition of lands. No question is raised, in error, on the pleadings. The cause was tried by the court, decree of partition made, and land divided by com-

missioners. A motion for a new trial was overruled. Exceptions and appeal taken.

The parties to the controversy are the widow and heirs of Andrew J. Harness, deceased, intestate, who, during his lifetime, purchased and caused to be conveyed to two of his sons, William W. Harness and Lewis H. Harness, each a farm of the value of four thousand dollars. These farms are claimed as gifts by William and Lewis, and charged by the widow and remaining heirs to be advancements.

A new trial was claimed by the appellants as of right, under the statute (2 G. & H. 283, sec. 601), but we think they were not entitled to it.

There was no question of title raised either by the pleadings or evidence, nor can we find by the record that the appellants paid the costs, upon which condition the new trial as of right depended.

A witness, A. J. Forgy, called by the appellees, was asked to state what conversation he had had with the deceased at any time about the advancements in controversy, and, over the objection and exception of the appellants, was allowed to testify to conversations had with deceased several months subsequent to the making of the conveyances to William W. Harness and Lewis H. Harness for the lands in controversy, concerning the alleged advancements. This was erroneous. Such a conversation was inadmissible, unless it occurred before, at the time of, or so immediately subsequent to the transaction as to become a part of the *res gestæ*.

The case of *Woolery v. Woolery*, 29 Ind. 249, and of *Hamlyn v. Nesbit*, 37 Ind. 284, which follows it, so far as they conflict with this opinion, are overruled. The rulings in those two cases seem to militate against a well settled principle in the law of evidence, and are quite unsupported by authority. Indeed, the current of authority is against them, and we think they ought not to be sustained as to that point. We cannot perceive any good reason why a different rule of evidence should be applied to the rights of a donee who takes by an

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advancement, from that applicable to the rights of a vendee who takes by bargain and sale. In neither instance should the statements of the grantor, made after he has conveyed the property, and independent of the transaction, be allowed to affect the rights of the grantee.

For the security of property and the repose of titles, the character of such a conveyance must be held as fixed at the time it is made, and not afterwards subject to the whim or caprice of the grantor. *Duling v. Johnson*, 32 Ind. 155; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Parks v. Parks*, 19 Md. 323; *Cecil v. Cecil*, 20 Md. 153.

Judgment reversed; cause remanded, for further proceedings according to this opinion.

49	386
168	357

 MIDDLEWORTH ET UX. v. McDOWELL.

DIVORCE.—*Foreign Judgment for Alimony.*—*Service by Publication.*—A judgment for alimony rendered in another state, where the only notice to the defendant was by publication, and he did not appear, and the record does not show that he was a resident of that state, can have no force in this State.

From the Knox Circuit Court.

J. W. Burton and *J. W. Ogden*, for appellants.

F. W. Viehe, for appellee.

WORDEN, J.—Complaint by the appellants against the appellee. Demurrer to the complaint for want of sufficient facts sustained, and exception. Final judgment for the defendant.

The case made by the complaint is this: The plaintiff, Mary E., was formerly the wife of the defendant, McDowell, but she obtained a divorce from him in the district court of Wapello county, Iowa, and has since intermarried with her co-plaintiff, Archibald Middleworth. In the proceedings for

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divorce, the defendant was notified by publication and not by personal service, and he did not appear thereto, but made default. In that proceeding, the plaintiff, Mary E., recovered a judgment or decree for alimony in the sum of five hundred dollars against the said McDowell. The record does not show whether McDowell was a resident of the State of Iowa at the time of the proceeding for divorce and alimony, but the inference is that he was not; otherwise it would seem that he should have been served with process. Nor is any statute of Iowa shown authorizing a personal judgment, as for alimony, on publication, without other service of process.

This action was brought on the judgment for alimony thus rendered, and the question arises, whether, on the facts above stated, the plaintiffs were entitled to recover.

It will be seen from the statement of the case, that the question does not arise, whether if McDowell had been a resident of Iowa at the time of the proceedings in the divorce case, and if there was a statute of that state authorizing personal judgments on publication, the judgment would be regarded as valid elsewhere. We assume that McDowell was not a resident of Iowa at the time of the proceedings in the divorce case, first, because that may be inferred from the fact that he was notified by publication only; and, secondly, if he was then a resident of that state, the fact should be made to appear affirmatively, in order that he be bound by the judgment for alimony, he having been notified by publication only, and not having appeared to the action, or otherwise submitted to the jurisdiction of that court. If McDowell was not a resident of Iowa, it is not very material what may have been the statute of that state in respect to notifying parties by publication, inasmuch as non-residents could not be affected thereby, to the extent of making personal judgments against them, founded on publication merely, valid in any other jurisdiction.

In *Beard v. Beard*, 21 Ind. 321, it was held to be competent for the legislature to authorize the courts of the State to render personal judgments for alimony, in divorce cases, upon constructive notice, against citizens of the State, but that it

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could not authorize such judgments, upon such notice, against the citizens of another state, unless the latter submit to the jurisdiction of our courts by voluntarily appearing to such action therein. See, also, upon this subject, the case of *Lytle v. Lytle*, 48 Ind. 200.

Whatever may be the effect given to the judgment for alimony in the state where it was rendered, it can have no force out of that state, for the reason that the court, by the publication, acquired no jurisdiction of the defendant which authorized it to render a personal judgment against him. This view is fully sustained by the cases of *D'Arcy v. Ketchum*, 11 How. (U. S.) 165, and *Board of Public Works v. Columbia College*, 17 Wal. 521.

The court below committed no error in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

JACKSON v. SWOPE.

APPEAL FROM JUSTICE OF THE PEACE.—Amendment.—Waiver.—Where a cause, commenced before a justice of the peace, was appealed by the defendant to the circuit court, and he there amended his answer of counter-claim, so as to claim a judgment against the plaintiff for seven hundred dollars after satisfying the claim of the plaintiff, the plaintiff not objecting to the amendment or taking any steps in relation thereto, and after issue joined upon the answer, the cause was, by agreement, referred to arbitrators, whose decision was to be final, judgment to be rendered thereon, and the arbitrators heard the cause, and reported to the court a finding in favor of the defendant for three hundred and ninety-seven dollars and sixty-eight cents, it was then too late for the plaintiff to object, he having waived the objection to the amount claimed by the defendant's amendment, which he might have made at the proper time, and it was error for the court to then dismiss the cause.

From the Morgan Circuit Court.

Jackson v. Swope.

W. R. Harrison and *W. S. Shirley*, for appellant.

S. Claypool, *F. P. A. Phelps*, and *S. Harriman*, for appellee.

DOWNEY, J.—Swope sued Jackson before a justice of the peace, for the price of goods sold and delivered. The complaint was in two paragraphs, each demanding judgment for eighty-seven dollars and eighty cents. The defendant pleaded a counter-claim, claiming judgment for two hundred dollars, after satisfying the plaintiff's demand.

The justice of the peace rendered judgment for the plaintiff in the sum of seventy-eight dollars and forty-four cents. The defendant appealed to the circuit court.

In the circuit court, the defendant amended his answer, and demanded judgment for seven hundred dollars, after satisfying the plaintiff's claim. The plaintiff replied by a general denial.

By an order of the court, on an agreement in writing, "the cause, as contained in the complaint, and answer and reply, and the issues in said cause," was referred to Jackson L. Jessup and David George, arbitrators, giving them the privilege of choosing a third man as an umpire in said cause.

It was agreed that the decision should be final, and should be entered of record in the said Morgan Circuit Court, and that judgment thereon should be rendered by said court.

A time and place were fixed for the meeting of the arbitrators. The parties each executed to the other bond with surety to abide by and perform the award and the judgment of the court thereon. At the time and place agreed upon, Jessup, one of the arbitrators, did not attend, and, by agreement of the parties and upon order of David George, the other arbitrator, another time and place were fixed for the meeting. Afterward, the referees reported to the court, that at the time and place agreed upon they met, the parties being present, and, in pursuance of the agreement, selected Wesley Allen as umpire; that after hearing the allegations and proofs, George, one of the arbitrators, and Allen, the umpire, agreed and awarded that Swope was indebted to Jackson in the sum of

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three hundred and ninety-seven dollars and sixty-eight cents; that Swope should pay that amount to Jackson, with interest from that date, and that Swope should pay the costs of the action.

It is stated in the report, that a disagreement having occurred between the arbitrators, the umpire was called upon and did aid in making the award. They also reported an itemized statement of the costs of the arbitration. Jessup, who signed another report or statement, was in favor of giving Jackson one hundred dollars only, and hence did not agree with the other arbitrator.

The defendant moved the court for judgment in his favor on the report. The plaintiff moved the court to strike the cause from the docket. Afterward, the defendant again moved for judgment on the report, and filed a notice of such motion, which he had caused to be served on the plaintiff.

It was then agreed, that "if the said defendant, Eli Jackson, shall, at the next term of this court, upon some day during the first week of the term, make such proof as shall entitle him, the defendant, to a rule of this court against said plaintiff, to show cause why said judgment should not be rendered by this court upon the award heretofore filed in this cause, then the said Samuel Swope agrees to waive service of notice of said rule, and to answer said rule without service of notice thereof immediately during said term, or upon any day that the court may order and direct; and the said Swope now enters his special appearance for the purpose of making this agreement; and this is to be without prejudice to his right to insist upon his motion to have said action dismissed."

It was stipulated by the defendant that the execution of the agreement should not waive his "right to insist that the case was referred to George and others to report as referees."

Under this agreement, the cause was continued until the next term of the court.

At the next term, the court overruled the motion of the plaintiff to strike the cause from the docket, and also the motion of the defendant for judgment on the report. The court then

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entered a rule that the plaintiff show cause why judgment should not be rendered upon the award filed and recorded, to which the plaintiff excepted.

The plaintiff then filed his reasons why judgment should not be rendered on the report.

The defendant demurred separately to the grounds of objection to the report, and his demurrer was overruled. He then replied by a general denial.

There was a trial by the court and a finding for the plaintiff, and that judgment ought not to be rendered on the award.

The defendant moved for a new trial, his motion was overruled, and final judgment rendered on the finding, that the defendant take nothing upon the said award, that the cause be stricken from the docket, and that the plaintiff recover his costs.

The errors assigned are the following:

1. Refusing to enter judgment in favor of the appellant upon the report of the referees.

2. Overruling the appellant's demurrer to the answer setting up reasons why judgment should not be rendered on the report of the referees.

3. Striking the cause from the docket on motion of appellee.

4. In rendering judgment in favor of the appellee for costs.

5. In refusing to grant a new trial on motion of the appellant.

The first question made is with reference to the jurisdiction of the circuit court. It is urged by counsel for appellee, that when the answer was amended in that court so as to claim an amount greater than that of which the justice of the peace had jurisdiction, the action should, for that reason, have been dismissed. The practice in appeals from justices of the peace seems to have been to treat the case, for many purposes, as if still pending in that court. It has accordingly been held, that the plaintiff cannot amend his complaint in the circuit court so as to claim an amount greater than that of which the

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justice of the peace had jurisdiction. *Pritchard v. Bartholomew*, 45 Ind. 219.

If, in the justice's court, the amount of the plaintiff's claim exceed the jurisdiction of the justice, the action should be dismissed; and if the defendant, after crediting the plaintiff's demand, claim a balance larger than the amount of which the justice has jurisdiction, his claim should be rejected. *Alexander v. Peck*, 5 Blackf. 308.

In the case cited, the defendant had filed before the justice of the peace a claim larger than that of which the justice had jurisdiction, and it was decided that it should have been set aside and rejected on motion in the circuit court.

Under these rulings, it is evident that if the plaintiff had moved the court to reject the counter-claim of the defendant filed in the circuit court, his motion should have been sustained. But he did not do this, but took the chances of getting a finding in his favor, and not until he was disappointed in this did he make any question as to the jurisdiction of the court.

The circuit court had jurisdiction of the amount claimed by the defendant, had the action originated in that court, and we are required, therefore, to decide the question whether, when one or both of the parties, on appeal from the judgment of a justice of the peace, pleads *de novo*, or amends the pleadings so as to claim an amount greater than he could have claimed before the justice of the peace, and no objection is made by his adversary, this is not to be regarded as a waiver of the objection which might have been made. We do not forget that it is a well settled rule of law, that consent of the parties cannot confer upon a court jurisdiction of a subject-matter, where the law does not give it. But this is not such a case.

As we have already said, the circuit court had jurisdiction of the amount claimed by the defendant, had the action originated in that court. There is no case, we think, where it has been held that the circuit court is ousted of its jurisdiction by an amendment in that court on appeal, unless the objec-

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tion was made at the time. We must either hold that the objection was waived by not making it at the time, or we must decide, as the circuit court appears to have done, that the court was ousted of its jurisdiction, and the whole proceeding void after the filing of the answer. We think we should hold, and accordingly we do hold, that the objection was waived, because it was not made in proper time.

The court must have disposed of the case on the ground that there was no longer any jurisdiction of the cause in the court, on account of the amendment of the answer; for otherwise the court should not have dismissed the action, but, if the report of the referees or arbitrators was set aside, should have again referred the cause, or proceeded to try it in some legal mode. Even had the plaintiff chosen to dismiss his action, in the event that the report was set aside, this would not have prevented the defendant from proceeding to judgment on his counter-claim. 2 G. & H. 217, sec. 365.

Inasmuch as it seems clear that the court erred in dismissing the action, and that the court did not pass upon the validity of the report of the referees or arbitrators, we will proceed no further in the examination of the questions in the case, until there has been a decision upon them in the circuit court.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

COOPER ET AL. v. HAM ET AL.

PRACTICE.—*Motion for New Trial.*—A motion for a new trial on the ground of the improper admission or exclusion of evidence, for the character and purport of which reference is made to a bill of exceptions not then filed, is too uncertain and indefinite to present any question.

HUSBAND AND WIFE.—*Proceedings to Subject Real Estate to Payment of Debt.*—

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A. bought certain real estate with a mill thereon of B., and caused it to be conveyed to the wife of A. Certain real estate of the wife of A. was given in part payment to B., and the notes of A. and wife secured by mortgage were given for the residue of the purchase-money. Before the notes were paid, the mill was burned, and thereafter the real estate was reconveyed to B., who accepted it as part payment of the notes. A. and wife had no money or property wherewith to pay the balance. C., a brother of A. had assisted him in running the mill before it was burned, and on certain contingencies was to have become the owner of a part of it. The citizens and neighbors raised some money to aid in starting another mill. C. procured another tract of real estate on his own credit, and on the suggestion of those proposing to aid in the erection of the mill, conveyed one-half of it to the wife of A., and the two brothers, with the assistance given them and on their credit, erected a mill, each of them working in the erection and running of the same.

Held, that B. could not subject the latter real estate to the payment of the balance due on his notes.

SAME.—Agency of Husband.—A wife may employ her husband to act as her agent in operating a mill owned by her, and such employment is not proof of an attempt on her part to defraud his creditors.

SAME.—The husband in such case has the right to give his personal services and skill to the management of his wife's property without any other compensation than the support and maintenance of himself and family.

From the Howard Circuit Court.

N. R. Overman and J. O'Brien, for appellants.

J. W. Kern, L. J. Hackney, and N. R. Lindsay, for appellees.

BUSKIRK, J.—The appellants by this action sought the recovery of a personal judgment against George W. Ham, upon two notes executed by him and his wife, and payable to the appellants, and a decree subjecting certain real estate to sale for the payment of such judgment.

A demurrer was overruled to the complaint and sustained to the second paragraph of the separate answers of each of the appellees, but no question is made in reference to such rulings.

The cause was tried by the court and resulted in a finding against George W. Ham in the sum of two thousand five hundred and ninety-seven dollars and sixty-six cents, and a finding in favor of the other appellees.

There is in the record what purports to be a special finding of facts and conclusions of law thereon, but such special finding is not signed by the judge, and does not appear to have been rendered at the request of either of the parties, and consequently no question is presented for our decision in reference to the conclusions of law announced.

The only assignment of error which presents any question here is based upon the action of the court in overruling the motion for a new trial, and that only presents the question whether the finding is sustained by the evidence. The appellants assigned as reasons for a new trial the admission of improper and the exclusion of proper evidence, as to the character and purport of which reference is made to the bill of exceptions, which was not then in existence, and was not signed and filed until long after the adjournment of the court. It is settled by repeated decisions of this court, that such reasons are too uncertain and indefinite to present any question for the decision of the lower court, and hence cannot be considered here.

The evidence is quite voluminous, but the facts proved can be so summarized as to present the questions of law arising thereon.

1. That on the 2d day of July, 1868, George W. Ham purchased of the appellants six acres of land with a mill thereon, for the sum of sixty-five hundred dollars, and caused the same to be conveyed to his wife, Frances A. Ham; that in payment of twenty-five hundred dollars of such purchase-money, Ham and wife conveyed to appellants sixty acres of land, which Frances A. had inherited from her father, and held as her separate estate; that for the balance of such purchase-money, George W. and Frances A. gave their notes and a mortgage on the property so purchased; that George W., being a practical miller, took charge of such mill and operated the same until the 15th day of June, 1870, when such mill was entirely consumed by fire; that during the time the said mill was so operated, George W. paid the appellants, out of the earnings of such mill, the sum of eleven hundred and fifty dollars;

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that after the mill burned, George W. and Frances A. reconveyed to appellants the six acres of land, and received a credit therefor in the sum of twelve hundred and sixty dollars, which left unpaid of such purchase-money the two notes sued on for one thousand dollars each, due respectively the 1st days of January, 1872 and 1873, with six per cent. interest; that the said George W. had no money or property of his own when such property was purchased; that Martin G. Ham, a brother of George W., and appellee, had no interest in such mill, but aided and assisted in running and operating the same under an agreement that when the purchase-money was paid to appellants, he was to have a one-third interest therein, but such arrangement was never consummated.

2. After the mill was burned, the citizens in and about Russiaville, where such mill had been situated, held several public meetings, and means were adopted to induce George W. and Martin G. Ham to build another mill in said town; that the sum of about sixteen hundred dollars in money, materials, and labor, were subscribed, to be expended under the control and management of a committee, about eighty per cent. of which was afterward paid; that such citizens were actuated mainly by a desire to have a mill in their vicinity, and secondarily to aid the Hams, who had lost everything by the fire; that while they desired George W. Ham to superintend the erection and operate the mill after its completion, they were unwilling that the title to such mill and necessary ground should be in him, because the appellants would sell the same on execution to satisfy their claims against him; that it was at first supposed that the fact that Frances A. Ham had signed the notes to appellants would render her liable, and that such property could be reached in her hands; that to avoid these dangers, Martin G. Ham purchased of Dr. Shirley certain ground as a site for such mill, and took a deed in his own name, and executed his own note for one hundred and fifty dollars in payment therefor; the money subscribed by the citizens being insufficient to erect such mill, the enterprise was about to be abandoned, when it was ascertained that a

mill could be purchased in Miami county and removed to Russiaville; the Hams went and examined the mill, and ascertained that it could be purchased for two thousand three hundred dollars; that to aid in the purchase of said mill, one Thomas Ratcliff conveyed to Martin G. Ham forty acres of land, and took his note therefor and a mortgage on the mill when put up at Russiaville; the mill purchased as aforesaid was paid for as follows: one thousand dollars in the land conveyed by Ratcliff; two hundred dollars cash, of money subscribed by citizens; two notes for two hundred and fifty dollars each, which were signed by the Hams and the committee of citizens; that there was an incumbrance on said mill of six hundred dollars, which was assumed by the purchasers; that the mill-site and mill were conveyed to Martin G. and Frances A. Ham; that after such mill was removed to Russiaville, the said committee, having ascertained that Mrs. Frances A. Ham had not rendered herself personally liable by signing the notes sued on, and having great sympathy for her in her loss by the fire, required of Martin G. Ham, as a condition on which they would aid in the construction of such mill, that he should convey to her one undivided half of said real estate purchased as a site for said mill; and such conveyance was made to her without the knowledge of herself or husband; that George W. and Martin G. Ham superintended and directed the erection of said mill, and aided, by their own labor and the use of a wagon and team which belonged to them, in its construction; that after the mill was completed, George W. and Martin G. ran and operated such mill until the 7th day of March, 1872, when Martin G. sold and conveyed to Melvin Seward one undivided half of such mill for twenty-seven hundred dollars, which was to be paid as follows: six hundred dollars, paid in cash; two notes for three hundred and ninety-eight dollars each, payable in eighteen and thirty months; and Seward assumed the payment of one-half of the debts of the mill, which were estimated at about fourteen hundred dollars; that after the mill commenced running, the Hams erected on the lots purchased of Dr. Shirley a small

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frame house, at a cost of about three hundred and fifty dollars, which was paid for out of the earnings of the mill, and was used by George W. Ham and his wife as a residence; the lots purchased of Dr. Shirley were paid for out of the earnings of the mill, and the two notes given for the mill purchased in Miami county were paid out of the earnings of the mill; that after Seward became the owner of one-half of such mill, he paid out of the earnings of the mill six hundred and twenty-eight dollars to Ratcliff, and he and George W. Ham executed a new note for four hundred dollars for the balance due, and secured the same by mortgage on mill, executed by Seward and wife and George W. Ham and wife; that there had been a foreclosure of the note for six hundred dollars, which was on the mill in Miami county when purchased, and the payment of which was assumed, which judgment was against Seward and George W. and Frances A. Ham; that George W. Ham had continuously worked and superintended the said mill from the time of its completion down to the commencement of the action; and that, when Seward purchased the interest of Martin G. Ham, he knew that George W. Ham was indebted to the appellants on the notes in suit for the old mill, which was burned, and he also knew of the donations made by the citizens, and how the mill was purchased and paid for as above stated, and made the purchase in good faith, and, as he swears, without any knowledge that the title had been taken in the name of Martin G. and Frances A., for the purpose of defrauding the appellants.

It is very earnestly insisted by counsel for appellants, that, upon the facts stated, George W. Ham was the owner of the entire mill, and that the court erred in refusing to decree its sale for the payment of the judgment rendered against him and in favor of appellants.

The acquisition of the property in controversy is very peculiar and unusual. After the destruction of the mill purchased of appellants, neither of the Hams possessed any money or property, and had it not been for the action of the citizens the present mill would not have been erected. It very clearly

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appears, from the evidence, that Martin G. Ham purchased the site for the present mill from Dr. Shirley in his own name and upon his individual credit, and he afterward, upon the requirement of the committee of the donors, conveyed one undivided half thereof to Mrs. Frances A. Ham. After the old mill was purchased in Miami county, Mr. Ratcliff conveyed to Martin G. Ham forty acres of land, which was used in part payment therefor. Martin G. Ham devoted his entire time, labor, and skill in the erection and operation of the mill, and was the recipient of the donation on the part of the citizens. We are unable to discover any fraud on his part or any attempt to cover up the property of his brother George. He was the absolute owner in fee of the site of the mill, and contributed as much to the erection of the mill as his brother, and, in our opinion, was legally, fairly, and equitably the owner of one-half, and had lawful right to sell his undivided half to Mr. Seward, who holds the same free from any claim on behalf of the creditors of George Ham.

We next inquire who was the legal and equitable owner of the other moiety of the mill. The means of Mrs. Ham were invested in the purchase of the mill from appellants, and with its destruction she and her husband were left destitute of money or property. The primary object with the citizens was to procure the erection of another mill, and they had the clear and undoubted right to have the title to such mill so vested as to secure its perpetuation. They were unwilling to contribute to the erection of a mill which would be sold upon execution to pay the debts of George W. Ham. They were under neither a legal nor moral obligation to provide for the payment of the debts of George W. Ham to appellants, and, hence, it was not fraudulent for them to have the title so vested as to defeat the payment of appellants' debt. The fact that Mrs. Ham was a married woman did not deprive her of the right and power to acquire a valid and legal title to either real or personal property by gift. The citizens required that the title to one-half of the property should be vested in her, and made this a condition upon which they would make a donation to aid in

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the erection of the mill. We think that Mrs. Ham became the legal and equitable owner of one-half of the property in dispute, and, being the owner, she had the right to appoint her husband her agent to carry on the business for her, provided such employment was in good faith and not merely colorable.

We make an extended quotation from the recent work of Bump on Fraudulent Conveyances, p. 269. He says:

“Creditors have no power to compel a debtor to labor, and earn the means to pay their demands. He may resign himself to hopeless and endless want, or he may limit his exertions to just such an extent as may be adequate to furnish him the means of a scanty subsistence, and in all this he violates no legal right of his creditors. The law allows even more than this. His first and most imperative duty is to support and maintain himself and family, from the proceeds of his labor. He is under no legal or moral obligation to appropriate these to the benefit of his creditors, and leave himself and his family to suffer hunger and want. Consequently he has the right to enter into a contract to labor for another in consideration of the support and maintenance of himself and family. If an attachment is laid in the hands of his employer, after a contract has been partially performed, he may refuse to complete it, and a new arrangement may be made for the purpose of protecting his subsequent earnings from the effect of such attachment. He is not permitted, however, to make an assignment of his future earnings with the intent to delay, hinder or defraud his creditors.

“NOT APPLY LABOR TO ACCUMULATION OF PROPERTY.—Although the law will not compel a debtor to labor and earn money to pay his debts, yet there is a strong moral obligation resting upon him to use the strength, skill and talents with which he is endowed for that purpose, and this obligation is one which the law to a certain extent recognizes and enforces. He has an election to labor or not as he may please, with which the law will not interfere. He is also countenanced by the law in the proper discharge of his duty to provide a maintenance and support for himself and his family. But beyond the necessary

wants of himself and his family, there is a limit which the law does not allow him to transcend. He is not permitted to treasure up a fund accruing from his labor or vocation, whatever it may be, and claim that it shall be protected for the benefit of himself or his family, against the demands of creditors. Every agreement or contrivance entered into with a view to deprive his creditors of his future earnings, and enable him to retain and use them for his own benefit and advantage, or to make a permanent provision for his family, is fraudulent and void. Although his creditors cannot compel him to labor for the purpose of satisfying their demands, yet they have a just claim in law upon the fruits of his labor performed.

“BUSINESS IN WIFE’S NAME.—The law does not permit him to carry on a business in the name of his wife, so as to invest the proceeds of his skill and labor in her name. If she has a separate estate she may employ him and compensate him for his services. Such employment, however, must be in good faith, and not merely colorable. If the character of an agent is assumed in an improper case, the law disregards it. An arrangement by which the husband acts as his wife’s agent without any compensation, or for a compensation that is insufficient, is, in effect, an attempt to make a voluntary conveyance of the products of his skill and labor in her favor, and is void as against his creditors. She is entitled to her money with interest, and the balance will be appropriated to the payments of his debts.”

The foregoing propositions of law are not entirely accurate, and the text is not fully supported by the cases cited. In support of the first paragraph of the above quotation, the following authorities are cited: *Leslie v. Joyner*, 2 Head, 514; *Griffin v. Cranston*, 1 Bosw. 281; *Holdship v. Patterson*, 7 Watts, 547; *Tecter v. Williams*, 3 B. Mon. 562; *Abbey v. Deyo*, 44 Barb. 374; *Tripp v. Childs*, 14 Barb. 85; *Gragg v. Martin*, 12 Allen, 498.

The ruling in *Leslie v. Joyner*, *supra*, was based upon the ruling in *Hamilton v. Zimmerman*, 5 Sneed, 39, where the court

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said: "The debtor is certainly under a moral obligation to use all reasonable exertions to satisfy the just claims of creditors; but he is under a positive obligation, in law as well as morals, to support and maintain his wife and infant children. This is his first and most imperative duty. But while this is so, and while he will be countenanced by the law in its proper discharge, he cannot make it the pretext for covering up and protecting from the just claims of creditors, any surplus fund accruing from his labor or vocation, whatever it may be."

In *Griffin v. Cranston*, *supra*, one partner sold and transferred to the other his interest in the business, on the condition that the latter should pay all the firm debts and the individual debts of the assigning partner created in the name of the firm, and the interest was worth less than the debts assumed; and it was also agreed that the retiring partner and his wife were to work for the other for their board, unless future profits were earned; and it was held that the assignment was not fraudulent, and the agreement for labor was valid.

In *Holdship v. Patterson*, *supra*, it was held, that a benefactor may provide for a friend the means of subsistence for himself and family without exposing his bounty to the debts or improvidence of the beneficiary. He has an individual right of property in the execution of the trust, of which he cannot be deprived by an execution against the trustee. The court say: "Though a right to the debtor's labor was given to an execution creditor by a provisional statute long since repealed, it exists not at the common law; and the defendant was therefore at liberty to dispose of his services for his own purposes and on his own terms. His tangible earnings would become liable to execution for his debts; but he was not under even a moral obligation to restrict his efforts exclusively to the liquidation of them. He might lawfully devote himself to the maintenance of his family only."

In *Teeter v. Williams*, *supra*, it was held, that a creditor cannot have a decree against one to whom his debtor has contracted for work and labor beyond the sum due; nor can the

Chancellor compel the debtor to perform a contract for labor, that the creditor may have the benefit of the price. This was a proceeding by attachment, and it was held, that a sum actually due for labor might be attached. It was further held, that the Chancellor possessed no power to compel a person to perform a contract for labor ; but that if the Chancellor could exercise such power of compulsion at all, he certainly would not fail to allow to the debtor, out of the proceeds of his labor, so much as was necessary for the support of himself and family, and would give the net balance only to the creditor.

The case of *Alley v. Deyo*, 44 Barb. 374, is reported in 44 N. Y. 343, and will be hereafter noticed.

The case of *Tripp v. Childs*, *supra*, was decided upon the ground of positive fraud, and need not be further noticed.

In *Gragg v. Martin*, *supra*, it was held, that an assignment of future wages, to be earned under an existing contract, if made for the purpose of preventing them from being attached by trustee process, is void ; and the fact that it was made openly and for a good consideration is immaterial, if an actual intent to defraud is established.

In support of the second paragraph above quoted, the following authorities are cited: *Patterson v. Campbell*, 9 Ala. 933; *Waddingham's Ex'rs v. Loker*, 44 Mo. 132; *Isham v. Schafer*, 60 Barb. 317.

The case of *Patterson v. Campbell*, *supra*, was where the parent invested the proceeds of his labor in the purchase of real estate, and took the title in the name of his infant daughter. The court say : " The question then resolves itself into one of right, not of jurisdiction, and it is said the debtor has the moral right to appropriate the proceeds of his labor to the advancement of his children in preference to his creditors. Of the moral duty of the parent to provide for the support and education of his children, there can be no doubt, and perhaps as little, that it is paramount to the obligation to creditors ; but the providing for support is quite a different thing from investing them with the title to property, which in most, if

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not all cases, must necessarily be a secret trust enuring to the benefit of the parent."

In *Waddingham's Ex'rs v. Loker, supra*, it was held that the law will not permit a man to withdraw his property from his creditors. Nor can a man owing debts be permitted to devote his capital, industry, or credit to the accumulation of property, to be held by some third person for his own use or that of his family, to the exclusion of his creditors. In all such cases, the law intervenes and goes behind the fraudulent and secret transaction, and subjects the property or trust funds to the payment of just and legal demands; and it was also held that the property in controversy had been donated to the wife and daughters of the debtor by a benefactor, and that consequently the debtor had no interest therein which could be reached by his creditors.

The case of *Isham v. Schafer, supra*, has an important bearing upon the present case. The facts were, that Mrs. Isham inherited a tract of land upon which she and her husband resided; that a brick dwelling-house was erected upon the premises, Mrs. Schafer furnishing a portion of the money to build the same, and the defendant, Henry Schafer, furnished the balance and contributed his labor as a gift to his wife. The object of the suit was to subject such property to sale for the payment of a judgment which had been rendered against Henry Schafer, in part, for materials which had been used in the construction of said house. The court say: "In every such case, however, it must appear that the debtor has contributed something in the nature of property to the real estate of another. Something which the creditor had the right to claim as property, and which could be appropriated and converted into money, by legal process, to satisfy a debt or demand. If it was something else, for instance, the mere labor, or skill, of the debtor gratuitously bestowed, no such relief could be had on account of it. The law gives the creditor a lien and claim upon the property of his debtor—upon the fruits of his labor and skill, when received or earned—but no lien or claim upon his capacity to labor, or upon his skill and ingenuity. His labor

and skill, upon which a creditor has no lien, or claim of any kind, the debtor may, if he sees fit, give away to another, and the creditor can have no remedy against the recipient, if it is in fact a mere gift. And so it has been held that a husband, who acts as agent for his wife, and oversees her affairs gratuitously, does not thereby render his wife liable to his creditors for what such services might be worth, if compensation were to be made. *Buckley v. Wells*, 33 N. Y. 518."

In support of the above quoted third paragraph, the following authorities are cited: *National Bank v. Sprague*, 5 C. E. Green, 13; *Quidort's Adm'r v. Pergeaux*, 3 C. E. Green, 472; *Keeney v. Good*, 21 Penn. St. 349; *Pawley v. Vogel*, 42 Mo. 291; *Glidden v. Taylor*, 16 Ohio St. 509; *Feller v. Alden*, 23 Wis. 301; *Shackleford v. Collier*, 6 Bush, 149; *Ashhurst v. Given*, 5 Watts & S. 323; *Knapp v. Smith*, 27 N. Y. 277; *Buckley v. Wells*, 33 N. Y. 518; *Gage v. Dauchy*, 34 N. Y. 293; *Savage v. O'Neil*, 44 N. Y. 298; *Abbey v. Deyo*, 44 N. Y. 343.

In *National Bank v. Sprague*, *supra*, the following propositions of law were laid down by the court:

1. Although a husband may give to the wife her services and earnings as against his creditors, when she carries on a separate business, without his assistance, with her own means and on her own account, yet in all cases where a business is carried on by a husband and wife in co-operation, and the labor and skill of the husband are contributed and united with those of the wife, the business will be considered as that of the husband, and not that of the wife, and the proceeds will not be protected for her as against his creditors.

2. The fruits of the wife's labor and skill, under such circumstances, are not her separate property within the terms or intention of the act for the better securing the property of married women."

3. Even if that act gave a wife the capacity to accept a gift of property from her husband, she could not be allowed to retain such gift as against his creditors, when made under circumstances which would prevent it from being sustained in favor of a stranger.

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4. That the circumstances proved an intent on the part of the husband and wife to take the title in her name for the purpose of defrauding his creditors, and that in such case the husband could not by assuming to act as the agent of his wife prevent such property from being subjected to sale for the payment of his debts.

In *Quidort's Adm'r v. Pergeaux, supra*, the property in question was purchased by and in the name of Mrs. Pergeaux for five thousand dollars, of which she paid in cash of her own money five hundred dollars, and there had been subsequently paid about three thousand dollars, the proceeds of a business which had been jointly carried on by and in the name of Mr. and Mrs. Pergeaux. The object of the suit was to subject the property to sale for the payment of the debts of Mr. Pergeaux. The Chancellor says: "If a married woman cannot carry on trade or business in her own name so that she can bind herself personally in reference thereto, but such power is confined to contracts relating to such separate estate as she may legally hold, then it follows, as a necessary consequence, that the business is the business of her husband, and the profits are his property. And, while a husband may, as against his creditors, allow his wife to have for her separate use the earnings of herself and the labor of their minor children, he may not give to her, to be invested in her own name, the proceeds of his own business, skill, and labor. Else it would follow that any married man who became embarrassed, could transfer his business to his wife, and continue it himself in her name, with all his skill and ability, and if she only took, or seemed to take, some part in the transaction of it, might invest the proceeds of his labor and management in the name of his wife, and set his creditors at defiance."

The facts in the case of *Keeney v. Good, supra*, were these: The plaintiff below was the wife of John M. Good, who owned certain lands on which a distillery was built. Becoming insolvent, Good made an assignment for the benefit of his creditors. The assignee sold the land to one Rheem for eleven hundred dollars, and by Rheem it was subsequently conveyed

to Mrs. Good, the present plaintiff, for the consideration of fifteen hundred dollars. Of this sum fifty dollars were paid at the time the deed was made, and the bonds and mortgage of both the husband and wife were afterward given for the balance. About one thousand dollars of principal and interest seems to have been paid on the lands. Immediately after the deed to Mrs. Good, she and her husband made a written agreement that the husband should carry on the business of farming and distilling in her name, accounting to her for the profits and receiving from her wages at the rate of twenty dollars per month. While he was doing business under this agreement, he bought a lot of hogs, brought them to the distillery, and fed them there for a time. The defendant levied on them as the husband's property, and the wife brought this action of trespass. BLACK, C. J., speaking for the court, said: "An insolvent man is well protected in Pennsylvania. The barbarous system of imprisonment for debt is totally abolished, and thrown aside among the rubbish of the dark ages. He can retain real property or goods to the value of three hundred dollars, which his creditors may not touch. He cannot be prevented from applying the fruits of his personal industry to the maintenance and education of his family; for the wages of his labor are not liable to attachment. But after supporting his family, he must give the best exertions of his mind and body to his creditors. This is but his reasonable duty—a duty sanctioned by all laws, moral, civil, and divine. No effectual mode of evading it has yet been invented. The usual device of covering the property of the debtor under the name of some friend, or a member of his family, will only answer the purpose as long as it remains undiscovered. I need not say how deeply all such shams are branded by the law with the marks of its detestation."

In *Pawley v. Vogel, supra*, it was held that the doctrines of equity touching settlements of money or property in trust for the sole and separate use of the wife relate purely to property that belongs to the wife before marriage, or which may have been given or bequeathed to her after marriage and expressly

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to her sole and separate use by the creation of a trust for that purpose. In such case, a proper instrument, based upon a valuable consideration, to the effect that she may carry on a separate trade on her sole account in the name of her trustee, may be protected at law and may be enforced in equity, for the benefit of her husband, against him and his creditors; but a voluntary agreement of this kind will not be good against his creditors. And neither law nor equity will permit an insolvent person, in the absence of any instrument like that mentioned, to carry on his own trade, with his own money, or with moneys that were donated by himself, in the name and under the cover of being his wife's trustee, for their common advantage. As between the parties themselves, a voluntary settlement upon the wife may be upheld in equity, and where the husband is not indebted at the time of making it, such settlement cannot be impeached by subsequent creditors merely on the ground of its being voluntary. But if he were indebted at the time, or if it were made with a view of being indebted at a future time, it will be void against creditors prior and subsequent.

The facts upon which the ruling in *Glidden v. Taylor, supra*, was based were briefly these: A husband, who had failed in manufacturing business, commenced business anew with the money of his wife, with her consent, and carried on the business, professedly as her agent, for years, making large profits therefrom. A principal source of the profits was the personal services and skill of the husband. The wife gave no personal attention to the business. There was no contract between her and her husband as to his compensation, and no accounts were kept between the parties. Part of the proceeds of the business was applied to the support of the family, part used by the husband, and part invested in real estate and personal property in the name of the wife. In a suit by the creditors of the husband, to subject the property so purchased to the payment of his debts, it was held: 1. The wife cannot claim the whole of the property as profits arising from her separate money. 2. Where she thus suffers her money to be employed

by the husband and blended with his earnings so that it cannot be separated, the most favorable position she can be allowed to assume, is that of a preferred creditor in equity, and, as such, entitled to her money and interest. The court say :

“ It is further to be noted that the difficulty of making a division is in no way attributable to the creditors. They are entitled to have the property of the husband appropriated to the payment of his debts, and if the wife authorizes or permits her money to be so mixed with the products of the business and industry of her husband that it cannot be separated, this furnishes no reason why she should gain and the creditors lose thereby.

“ Without entering into an exposition of the consequences that would follow the adoption of a rule sustaining the present claim of Mrs. Taylor, it is sufficient to say that we are satisfied that sound public policy and the settled principles of law and equity alike forbid its adoption ; and that where a wife thus suffers her own money to be employed by her husband, and blended with his earnings so that it cannot be separated, though the business may be conducted in her name, the most favorable attitude she can be allowed to assume, in a controversy with his creditors, is that of a creditor in equity. At law, she can, of course, have no standing as a creditor.

“ The arrangement between the husband and wife, whereby he undertook to carry on business in her name and for her exclusive benefit, was, in effect, an attempt to make a voluntary settlement of the products of his skill and industry in favor of his wife ; and the purchase of the property, and its conveyance to her was but the carrying out of the arrangement.

“ The principle of the arrangement would be the same whether it embraced property which he had already acquired, or only his future acquisitions ; and, if the arrangement be valid as against creditors for the period of about four years that elapsed from the time of its date to the time of the trial, it may be continued during the joint lives of the parties, if they so elect ; and if the husband should survive the wife, no

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good reason is perceived why, if he should choose to do so, he might not prolong the arrangement for the benefit of her legal representatives."

In *Feller v. Alden*, *supra*, it was held: 1. A wife owning land as her separate estate may cultivate the same by means of the labor of her husband and minor children, and the legal title to the products and proceeds thereof will still be in her, so that they cannot be levied upon under an execution against the husband. 2. Whether a court, in a proper proceeding in equity, will apportion such proceeds and products with reference to the proportionate value of the wife's capital, and the labor and services of the husband and minor children, and subject a due portion thereof to the payment of the husband's debts, is a question not raised in this action. 3. The mere fact that the wife employs the husband's services in cultivating her land is not proof of an attempt to defraud his creditors. 4. Money placed by a wife in her husband's hands to be invested for her does not thereby become his property.

The court, in speaking of the rights of the wife, say: "For, if the farm were really the separate estate of the wife, as we have already said, the statute expressly declares that she may hold and enjoy it, with the rents and profits, in the same manner and with the like effect as though she were unmarried. It would seem to follow from this, that she might cultivate the farm, and manage the personal property, by means of any agency which any other owner of such property might employ, and the produce thereof, with the increase of stock, would belong to her."

In *Shackleford v. Collier*, *supra*, it was decided that, although a *feme covert* may acquire the possession of property as separate estate, yet if its acquisition was in consideration of the money or property of the husband, which was subject to the claims of his antecedent creditors, the wife's claim will generally be made to yield to those of the creditors; and the real and personal estate in controversy in this case being in part the separate estate of the wife, and the remainder subject to the husband's

creditors, it was held that so far as the separate estate of the wife entered into the purchase or production of the real and personal property in controversy, her title thereto was valid and sustained; and as the savings by the *feme covert* out of her separate property are hers, the products and accumulations of her separate estate must be included in estimating her present interest in said property; and that after securing the title and possession of the wife as her separate estate, the residue was subject to the claim of the husband's creditors.

The case of *Ashhurst v. Given, supra*, involved the rights of a testator, trustee, and *cestui que use*. A large estate was devised to Samuel Given, in trust for various persons, and it was provided that the trustee, as compensation for his services, was to be allowed a reasonable support out of the trust funds for his personal services rendered in conducting and managing the trust estate. The reason given by the testator for not devising any part of his estate to his son Samuel was to prevent the estate devised to his children and heirs from being appropriated to those debts which he contracted in an unfortunate business.

The estate was so managed by the trustee that it greatly increased in value. The creditors of Samuel, by this suit, sought to reach the estate devised to his children, and if this could not be done, then that the value of his services should be subjected to the payment of his debts. It was held that, as the testator was under neither a legal nor moral obligation to pay his son's debts, he had the right to devise property to his children in such a manner as to prevent the creditors of his son from subjecting the same to the payment of their debts. In reference to the services of Samuel as such trustee, the court say:

“Neither can it advance such claim on the part of Samuel's creditors, that the trust estate may be greatly enhanced by his personal services, and that his services may be worth much more than his support or maintenance. A man, though indebted and wholly unable to pay anything, may dispose of his personal services at what price he pleases, and his creditors

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cannot object to his doing so. If he be content to give them for his mere support and maintenance, without more, he has unquestionably the right to do so; though I would say, if he has it in his power by means of his personal services, even when he is destitute of all other means, to support himself and at the same time to pay his creditors, he ought to do so. A proper sense of moral obligation requires it of him. But if he does not choose to do so, it cannot be tolerated for a moment that his creditors shall be permitted to seize upon whatever has been committed to his possession and care, to be managed expressly for the use and benefit of others, and not for himself."

In *Knapp v. Smith*, 27 N. Y. 277, the court say: "Where the husband is indebted and insolvent, as was the case here, there is generally more or less reason to suspect that such arrangements are adopted as a cover to disguise the substantial ownership of the husband and to defraud the creditors. Whether, in a given case, the transaction is sincere and *bona fide*, or a colorable device to cheat the creditors of the husband, is a question of fact, to be determined by the jury or other forum entrusted with the decision of such questions. In this case, the referee has found the facts necessary to show title in the plaintiff to the property in question, and he has omitted to find that her title was infected with fraud. On the contrary, by stating that the acts of the husband were done in the character of the agent of the plaintiff, and that she was the owner of the cattle which were seized on the execution, he has virtually negatived the allegation of fraud. It is not our duty or right to review the testimony, with a view to pass upon the correctness of his conclusion, and we, therefore, express no opinion upon the evidence in this case."

In the case of *Buckley v. Wells*, 33 N. Y. 518, the court say: "The referee does not find that there was any fraud in the transaction. Indeed, it would be difficult to predicate fraud upon such an arrangement. The wife of an insolvent man, having a small separate property, derived from her mother, is naturally desirous that her husband may be engaged in some business, by which, in connection with her estate, a

support may be provided for a large family of children. The husband has been a merchant. The wife is willing to embark her property in that business with which her husband was familiar, hazardous though it may be; and she empowers and authorizes him to carry on business for her and on her money and credit, holding himself out to the world as her agent. There was nothing fraudulent in that. There is no law in this State which mortgages to the creditor either the person or the labors of his debtor—no longer a law which consigns the innocent and unfortunate to confinement within prison walls. The duty rests upon him to use his best efforts for the payment of his debts; but there is a duty which he owes alike to the public and to his family which is sacred, and that duty is, to provide for the nurture, education and support of his children. He is said to be worse than an infidel, who neglects it. In seeking employment for that purpose, he may apply to the wife, if she have a separate estate, as well as to a stranger. If the law allows her to hold property—her own at her marriage, or coming from others besides her husband and free from his control—of necessity, she must be permitted to manage it herself, or she may employ others to act for her. As to that separate estate, she and her husband are as distinct before the law as if the marital relation did not exist. As to that property she acts as a *feme sole*, and may deal with her husband as with a stranger, and may, therefore, necessarily employ him and compensate him for its management.”

In *Gage v. Dauchy*, 34 N. Y. 273, the court say: “While the legislature leaves the husband the right and makes it his duty to live with his wife, he must necessarily live upon her farm, if they have no other place to live. Surely it could not have been the object of the legislature to deprive the wife of the benefit of his services. The idea that there should be an agreement between them as to wages is absurd; for the legislature has not yet changed the common law so as to allow them to make a business contract with each other. Certainly, there is no way provided to enforce it. But, even upon grounds of equity, there is no reason why the husband should be enti-

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tled to the growing crops which he helps to cultivate on her farm. The law still requires him to support his wife and family. If it was competent for the husband and wife to make an agreement in respect to his labor, they might agree that he should bring the amount of his wages into the house to be expended in providing them with food and clothing. As he is, by law, bound to provide for his wife and family, the whole support of the family might be cast upon him, while she used the rents, issues and profits of her separate estate to enlarge her wardrobe, or to engage in some new business which the law allows her to carry on, on her sole and separate account, without interference of her husband.

“If I am not mistaken, this case is controlled by the authority of *Knapp v. Smith*, in this court, already referred to. There is no difficulty in holding that, at law, a married woman may now own personal property, as against her husband. But her title is always open to inspection, and may be set aside by the court or jury in favor of those who have a right to challenge it for fraud. The creditors cannot reach it upon the ground that it is the husband's, as against his wife, but only upon the ground of fraud.”

In the case of *Abbey v. Deyo*, 44 N. Y. 343, the court say: “In *Buckley v. Wells*, 33 N. Y. 518, it was decided that a married woman could manage her separate property through the agency of her husband, and was entitled to the profits of a mercantile business, conducted by her husband in her name, when the capital was furnished by her, and he had no interest but that of an agent. It was further held that the application of an indefinite portion of the income to the support of her husband did not impair the wife's title to the property. While the law does not prohibit her from doing so, and where the property which is the subject of dispute does not come from him, this circumstance furnishes no evidence of fraud. In arguing this point, the appellant's counsel insists that the services, the time and talents of the husband are valuable, and he has no more right to give them to his wife, as against his creditors, than to give to her his property to their preju-

dice. The one, he says, is as much their property as the other. This argument is entirely unsound. The property of a debtor, by the laws of all commercial countries, belongs to his creditors. He must be just before he is generous. He must pay before he gives. Not so with his talents and his industry. Whether he has much, or little, or nothing, his first duty is the support of his family. The instinctive impulse of every just man holds this to be the first purpose of his industry. The application of the debtor's property is rigidly directed to the payments of his debts. He cannot transport it to another country, transfer it to his friend, or conceal it from his creditor. Any or all of these things he may do with his industry. He is at liberty to transfer his person to a foreign land. He may bury his talent in the earth, or he may give it to his wife or friend. No law, ancient or modern, of which I am aware, has ever held to the contrary. No country, unless both barbarous and heathen, has ever authorized the sale of the person of a debtor for the satisfaction of his debts."

We proceed to make an application of the doctrines laid down in the foregoing authorities to the present case, but before doing so, we will re-state the positions assumed by counsel for appellants.

It is claimed that the entire mill property belongs to George Ham, and that the same should be subjected to sale for the payment of appellants' judgment. When the mill was purchased and put up, George Ham was destitute of property and means. He did not put into the mill anything that was subject to sale upon execution, or which could be reached by attachment or proceedings supplementary to execution. It is abundantly established by the foregoing authorities that the citizens had the right to impose, as a condition upon which they would aid in the construction of such mill, that the title thereto should be vested in such manner as would prevent the appellants from subjecting the same to sale for the payment of their debt against George Ham. They chose to have it vested in Martin G. Ham and Mrs. Frances A. Ham. Such arrangement constitutes no evidence of fraud. If George

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Ham had possessed money or property which had been put into the mill, his creditors would have the right to complain. We think it is very clear, both on principle and by authority, that the legal title to such property was in Martin G. Ham and Mrs. Frances A. Ham.

But it is argued that the fact that George Ham acted as the agent of his wife in the purchase, erection, and operating of the mill, affords very strong if not conclusive evidence, that the transaction is fraudulent. The position is wholly unfounded. Mrs. Ham had the undoubted right to employ her husband to act as her agent in operating the mill, and such employment is not proof of an attempt on her part to defraud his creditors. It is equally well settled, that she is entitled to the proceeds and profits of the mill.

It is further insisted that George Ham has no legal right to give his services and skill to the management of the business and property of his wife; in other words, that his personal services and skill, and the products thereof, belong to his creditors.

It is firmly settled by the foregoing authorities, that the first and highest obligation of a husband is to provide for the support, maintenance, and education of his family, and that after this has been accomplished, he should give the best exertions of his mind and body to accumulate means for the payment of his debts. But, while this moral obligation rests upon a married man, there is no means known to the law by which it can be enforced.

George Ham has the right to give his personal services and skill to the management of his wife's property, without any other compensation than the support and maintenance of himself and family. In the present case, there has been no accumulation of other property resulting from the profits of the mill, nor has the mill been paid for; but there are debts against it, and liens resting upon it. If these debts are paid, and the liens discharged, the question which is considered in several of the foregoing cases may arise, and that is, whether the husband can, by his labor and skill, add to and increase

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the separate property of his wife, without giving his creditors the right to have the proceeds and profits apportioned between themselves and the wife. Or, if the earnings of the husband should be invested in other property, in the name of his wife, or if there should be money coming to him for his services and skill, which could be reached by a proceeding in attachment or supplementary to execution, the question discussed in many of the above cases would arise; but these questions are not now before us, and we decide nothing in reference thereto.

We have been very greatly aided in the examination of the important questions presented in the record by the very elaborate and able briefs with which we have been furnished.

We are entirely satisfied with the ruling of the court below. We think the appellants have no right to subject the property in question to sale for the payment of their judgment. Inasmuch as George Ham did not put into the mill anything which could have been sold upon execution in satisfaction of their judgment, they have not been defrauded; and as there is no accumulated fund resulting from his labor, and as the proceeds of his personal services and skill have been applied to the support of the family and the payment of the debts contracted in erecting and operating the mill, there is no tangible property which is subject to sale upon execution.

The judgment is affirmed, with costs.

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WILL.—*Devise in Satisfaction of Obligation to Convey.*—A father, owning certain real estate with a site for a water mill thereon, formed a contract of partnership with his son A., by which a mill was to be erected and A. was to become the owner of one-half of the mill and mill-site, and the contract was executed in all respects, except that the father died without

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conveying one-half of the mill-site to A., but left a will, by which he gave one-half of the mill and mill-site to A. and the tract of real estate on which the mill-site was located to his widow for life, and after her death to his son B., excepting in each of the latter devises one-half of the mill-site before devised to A.

Held, that the testator intended the devise to his son A. as a satisfaction of his obligation to convey to him one-half of the mill-site; and he could not claim the whole, one-half by contract and the other half by devise.

From the Monroe Circuit Court.

J. T. Cox, J. F. Pitman, W. R. Harrison, and W. S. Shirley,
for appellant.

P. C. Dunning and J. S. Hester, for appellee.

WORDEN, J.—Complaint by the appellant against the appellee, alleging, “that heretofore, to wit, on the ——— day of ———, 1839, at said county, one Solomon Green, Sr., the father of the plaintiff and defendant, was the fee simple owner in his own right, and in possession of the following lands, to wit: the north-east quarter of section 25, in township 8, north of range 2 west; which said tract of land was traversed by a stream of water, and had thereon a site suitable for a water grist-mill; and said Solomon Green, Sr., and plaintiff then and there entered into and formed a partnership, for the purpose of erecting and operating on said land and stream of water and site a water grist-mill; and in pursuance of said partnership, it was agreed between said Solomon, Sr., and plaintiff, that said Solomon should, and he then did, sell and deliver to plaintiff, for the purposes of said partnership and said mill, the said mill-site, to wit, five acres in extent and amount of said tract of land, to be so laid off and bounded as to embrace the dam, race, yard, and building site for said mill edifice, at the price of one hundred dollars; and plaintiff did then proceed, in pursuance of said agreement as to said partnership, to build, finish, and furnish with all necessary machinery said grist-mill on said land, stream, and site; and, in money, work, labor, and materials, in the construction of said mill, did pay to said Solomon, Sr., the sum of one hundred dollars as the price of said five acres of said land; that by the terms

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of said partnership agreement, said Solomon, Sr., and plaintiff each of them became entitled to, and were the owners of, one-half thereof; and said Solomon then and there agreed to make to plaintiff a good and sufficient title to one-half thereof; that in pursuance of said partnership agreement, plaintiff expended and laid out in constructing said mill and the dam and the race, and machinery therefor, and in repairs thereon, and in labor in operating the same, the amount and value of three thousand dollars; that from the time aforesaid until the — day of —, 1849, said plaintiff, on behalf of said partnership, continued in possession of said mill-site and mill, and to operate said mill for the benefit of said Solomon, Sr., and himself; at which time and at said county, said Solomon, Sr., departed this life without having executed to plaintiff the deed of conveyance for said mill-site; that said Solomon, Sr., before his death, made and published his last will and testament, which was duly proven and entered of probate in this court, a copy of which is filed herewith and hereof made a part, wherein and whereby he bequeathed to plaintiff his half of said mill, with said site, embracing said five acres of said tract of land, to be so laid out as to include said mill, mill-race, and mill-pond, and therein and thereby also bequeathed to said defendant the said tract and quarter section of land, after the death of his widow, subject to the said bequest of said mill and mill-site to plaintiff; that said defendant acquired possession of said tract and quarter section of land on the — day of —, 1854, upon the death of the widow of said Solomon, Sr., except the said mill and mill-site, as set forth herein, but plaintiff retained and still holds and retains the possession and ownership of said mill and site, and has so retained, held, and owned the same and the possession thereof from the year 1839 to the present; that said defendant has had full and perfect notice and knowledge of each and all of the facts herein alleged from the time of the formation of said partnership, in 1839, down to the present; that defendant now, and for three years and more last past, has pretended and given out that the plaintiff is the owner of

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but one-half of said mill and but one-half of the said mill-site, dam, race, and yard, and that the said Laban is the owner of the other half thereof, and has threatened to oust and deprive plaintiff of the use, possession, and ownership of one-half thereof, and thereby has created a cloud upon plaintiff's title thereto, and greatly diminished the value thereof to plaintiff; wherefore plaintiff prays that he may be adjudged the absolute owner in fee simple of said mill, mill-site, dam, pond, and yard, and of the said five acres of land," etc.

The portions of the will set out in the complaint, necessary to an understanding of the question involved, are as follows:

"As to such worldly estate as it has pleased God to entrust me with, I dispose of the same in the following manner: *

* * I also give and bequeath to my son Solomon, his heirs and assigns forever, the following parcel of land, as follows: The west half of the north-west quarter of section 19, in township 8, range 1 west; also one-half of the grist-mill, with five acres of land, laid out in such manner so as to include the mill, mill-race, and mill-pond, which parcel of land lies in the north-east quarter of section 25, township 8, range 2 west. * * * I also give and bequeath to my wife Rachel the following parcel of land her lifetime, or during her widowhood, to wit: The north-east quarter of section 25, in township 8, range 2 west, with the exception of the one-half of the five acres bequeathed to my son Solomon. * * * I also give and bequeath to my son Laban, his heirs and assigns forever, the following parcel of land after the death of his mother, to wit: The north-east quarter of section 25, in township 8, north of range 2 west, with the exception of the one-half of the five acres bequeathed to my son Solomon."

A demurrer was sustained to the complaint, for the want of a statement of sufficient facts, to which exception was taken, and final judgment was rendered for the defendant.

The error assigned is that supposed to have been committed in sustaining the demurrer.

The question involved is, whether the plaintiff, on the facts stated, is entitled to one-half only of the five-acre tract of

land, or to the whole of it—one-half by virtue of his purchase from his father and the other by virtue of the will.

It may be observed, in a preliminary way, that there is no question in the case as to the partnership accounts between the plaintiff and his father. It is alleged that the plaintiff, in the construction and operation of the mill, etc., expended the sum of three thousand dollars. But how much his father expended, or whether anything, does not appear; nor does it appear how much the plaintiff had been reimbursed from the proceeds of the mill. It does not appear, even if that would be material in the cause, that anything would have been due the plaintiff from his father on a full settlement of their partnership accounts, and taking into consideration the disbursements of each.

Another matter preliminary to the main question may be noticed. What did the plaintiff buy, and what did his father sell to him? In one part of the complaint, it is alleged to have been the five acres; but it is subsequently alleged that the plaintiff and his father “each of them became entitled to and were the owners of one-half thereof; and said Solomon then and there agreed to make to plaintiff a good and sufficient title to one-half thereof.”

It appears clearly enough, therefore, that the plaintiff bought of his father the half only of the five-acre tract, and his father agreed to convey to him that half. The payment for the same is alleged to have been made, and we assume that there was such part performance as took the contract out of the statute of frauds. The father was under obligation to convey to the plaintiff the half of the tract, but died without having done so, the legal title to the whole of it remaining in himself up to the time of his death. Though the property was partnership property, and for many purposes might be regarded as personal property, yet the legal title remained in the father up to the time of his death, and upon his dying intestate it would have descended to his heirs, subject to any rights growing out of the partnership and to any rights of the plaintiff as purchaser. Parsons Par., 373; Story Par., sec. 92.

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We have seen that the plaintiff's father died under an obligation to convey to the plaintiff one-half of the property. We now inquire what he did by his will. He gave to the plaintiff "one-half of the grist-mill, with five acres of land, laid out in such manner as to include the mill, mill-race, and mill-pond, which parcel of land lies in the north-east quarter of section 25, township 8, range 2 west." The will immediately proceeds to devise the same quarter section of land to his wife for life or during her widowhood, "with the exception of the one-half of the five acres bequeathed to my son Solomon," with remainder over in fee to Laban, subject to the same precise exception. In construing a will, all its parts must be considered in order to arrive at the true meaning and intent of the testator. There is first given to the plaintiff "one-half of the grist-mill, with five acres of land," etc. But the same land is subsequently devised to the widow for life, with remainder in fee to Laban, except "the one-half of the five acres bequeathed to my son Solomon." This renders it very clear that in the devise to Solomon it was intended to give him the one-half of the mill and one-half of the five acres of land only, instead of the whole of the five acres. An argument is based by the appellant upon the fact that, in the clause making the devise to the plaintiff, one-half of the mill is mentioned, but is not in either of the exceptions which are contained in the devises to the widow and to Laban.

We have seen that, by the terms of the will, the clear and undoubted intention was to give the plaintiff one-half of the five acres only, and not the whole. The devise to him of one-half of the five acres would have carried with it one-half of the mill thereon, without any express mention thereof. So, the exceptions to the devises of the quarter section, of "the one-half of the five acres bequeathed to my son Solomon," will save from the devise the one-half of the mill. "The grant of land carries houses, trees, and everything standing or growing upon the surface." 3 Washb. Real Prop. 338, side p. 625.

The will of the testator seems to give to the plaintiff just what he was bound by contract to convey to him. And if the

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plaintiff is entitled to one-half of the five acres by virtue of the contract, and the other half by virtue of the will, then the clause in the will giving to the widow and to Laban the whole quarter section, except the half of the five acres bequeathed to Solomon, must be nugatory so far as the other half of the five acres not excepted out of those devises is concerned.

This would be contrary to the expressed intention of the testator. He expressly provided, that the widow and Laban should have the entire quarter section, except the one-half of the five acres bequeathed to Solomon. This could not be, if Solomon is entitled to one-half by contract and the other half by the devise.

Under these circumstances, it must be held that the testator intended the devise to the plaintiff as a satisfaction of his obligation to convey to him the half of the five acres of land, and that the plaintiff cannot claim one-half by contract and the other half by devise.

“Satisfaction,” says Story, “may be defined in equity to be the donation of a thing, with the intention expressed or implied, that it is to be an extinguishment of some existing right or claim of the donee. It usually arises in a court of equity as a matter of presumption, where a man, being under an obligation to do an act (as to pay money), does that by will, which is capable of being considered as a performance or satisfaction of it, the thing performed being *ejusdem generis* with that which he has engaged to perform. Under such circumstances, and in the absence of all countervailing circumstances, the ordinary presumption in courts of equity is, that the testator has done the act in satisfaction of his obligation.” Story Eq. Jur., sec. 1099. See, also, on this subject, 1 Powell Devises, 433, and note 4; Roper Leg. 1028; *Blandy v. Widmore*, 1 Peere Williams, 324, and note; *Chancey’s Case*, 1 Peere Williams, 408, and note; 2 Redf. Wills, 185, and note; *Eaton v. Benton*, 2 Hill N. Y. 576.

Whatever doubts there may be as to the propriety of indulging in the presumption that the bequest or legacy was intended by the testator as a satisfaction of his obligation, in the absence

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of anything in the will evincing such intent, such doubts cannot affect the question involved here. Here it is manifest, as has already been shown, that the testator intended that the plaintiff should have only one-half of the five acres, for he devised the other half to his widow and Laban. Hence the will, on its face, shows that he intended the devise of the half of the five acres to the plaintiff to be a satisfaction of his obligation to convey it to him.

For these reasons, we are of opinion that the ruling below was right, and that the judgment must be affirmed.

The question is not involved here, nor do we decide, whether the appellant cannot protect his possession under the statute of limitations against an action brought to recover or part the the property. See, however, the case of *Vanduyne v. Hepner*, 45 Ind. 589.

The judgment below is affirmed, with costs.

BUSKIRK, J., having been of counsel in the cause, did not participate in the decision.

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CRIMINAL LAW.—*Corrupt Agreement.*—Where two or more informations are pending against the same person for unlawful sales of intoxicating liquors, an agreement between the defendant and the prosecuting attorney, that if the defendant will plead guilty to one of the informations, the fine shall only be of a certain amount, and the other information shall be dismissed, and the defendant's permit shall not be forfeited, is a corrupt agreement, and the defendant who is misled by thus corruptly purchasing his indulgence, is not entitled to relief.

From the Elkhart Circuit Court.

R. M. Johnson and J. D. Osborn, for appellant.

C. A. Buskirk, Attorney General, *W. C. Glasgow*, Prosecuting Attorney, and *J. A. Simmons*, for the State.

BIDDLE, J.—Prosecution by the State against the appellant, by affidavit and information, for selling intoxicating liquor to a minor. Motion to quash overruled; exception; plea, guilty; fine.

The appellant afterward appeared in open court and filed the following affidavit:

“Elza Golden, being duly sworn, upon oath says, that he is the defendant in the above entitled cause; that on the 25th day of April, 1874, one John M. Vanfleet, who was then and there deputy prosecuting attorney for Wesley C. Glasgow, the prosecuting attorney of the thirty-fourth judicial circuit of Indiana, of, in, and for the township of Concord, Elkhart county, Indiana, the same being within said thirty-fourth judicial circuit, filed in the office of the clerk of this court an affidavit and information, charging this defendant with having unlawfully sold, bartered, and given to one Charles E. Jessup, a minor under the age of twenty-one years, one glass of intoxicating liquor, to be drunk at and in the house where sold, in violation of law, and which said affidavit and information are attached hereto and made a part hereof, and marked ‘A’ and ‘B’ respectively; that a warrant was duly issued on said affidavit and information, on said day, by the clerk of this court, and duly served on this defendant by John W. Egbert, sheriff of this county and of this court, and by means of which this defendant was brought before this court under arrest, and compelled to give bail for his appearance herein from day to day; that said cause was regularly placed on the trial docket of this court for trial, and numbered on the criminal docket of this court 83; that while so on the docket of said court and pending herein, to wit, on the 6th of May, 1874, the said John M. Vanfleet, who was then and there acting as an officer of this court, and recognized as such by the court, and permitted to prosecute the pleas of the State in said cause, in said court, by the judge of said court, stated, and represented, and affirmed to this affiant that if affiant would plead guilty in said cause, the fine should only be ten dollars and costs, and that he, the said Vanfleet, would dismiss and enter a *nolle prosequi*

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in other similar prosecutions then pending in said court against affiant, for another alleged violation of the liquor law, viz., cause 84 on the criminal docket of this court, and also dismiss another similar cause against Sylvester W. Shumard, then pending in said court, viz., cause numbered 85 on the criminal docket of this court; and said Vanfleet further represented then and there to affiant that such plea of guilty in said cause would not invalidate or forfeit affiant's permit to sell intoxicating liquors, which had theretofore been duly granted to affiant, and that he, said Vanfleet, would give affiant his word and honor that his said permit would not be forfeited, and that affiant should not be disturbed in his business of selling intoxicating liquors under said permit until a judgment of forfeiture should be regularly obtained, which could not be done until the next term of the court in September next, and upon an action regularly instituted against affiant for that purpose; that affiant being ignorant of the law in this respect, and believing that said Vanfleet knew and correctly stated the law to him, and fully relying upon such belief and upon said Vanfleet's words, so pledged, that affiant should not be disturbed in his said business, consented to and did thereafter plead guilty in said first-named cause, and submit to a judgment of ten dollars and costs therein against him, and did pay to said Vanfleet his fee as prosecuting attorney, viz., five dollars, and also the other costs taxed in said other cause, number 84, and so dismissed, amounting in all to twelve dollars and fifty cents, which said Vanfleet received; and affiant further says, that he was not and is not guilty of the offence charged against him in said information and affidavit filed in said cause number 83; that he did not so sell any intoxicating liquor to said Charles E. Jessup in violation of law as therein charged, but that he so pleaded guilty in said causes solely for the reason that he believed the cost to him, in time and money expended, would be greater to defend said causes, than to plead guilty and pay said judgment, and because of such statements so made by said Vanfleet; that afterward, viz., on the 13th of May, 1874, the said Vanfleet

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formally notified affiant by letter that if affiant sold any more intoxicating liquor, he, Vanfleet, as such prosecuting attorney, would prosecute affiant for all such sales, as for selling intoxicating liquor without a permit, and that said affiant should be so prosecuted, and his place of business should and would be abated as a nuisance by reason of such sales; and affiant further says, that he had theretofore duly obtained a permit to sell intoxicating liquor at his said place of business, and had then, and yet has, a large sum of money invested in said business on the faith of such permit, and relying thereon for authority to continue such business; that he would not so have pleaded guilty in said cause but for said representations and inducements so made and held out by said Vanfleet, and that he will be greatly injured in loss of time, expenses, defence, and otherwise, if said Vanfleet so prosecutes him as he threatens to do; and that to avoid such prosecution, affiant believes he will be compelled to close his said place of business, to his great injury and damage, unless the judgment in this cause, number 83, be set aside, and he be allowed to defend said cause.

ELZA GOLDEN.

“Subscribed and sworn to before me, this 3d day of June, 1874.

LAPORT HEFNER, Clerk.”

The affidavit of Sylvester W. Shumard was also filed in support of the appellant's affidavit. Upon these affidavits, the appellant moved the court to set aside the judgment and allow him to plead not guilty to the information. The court denied his motion; he excepted, and appeals to this court.

The appellant, having shown us by his own affidavit that he accepted a corrupt proposition and corruptly purchased his indulgence, is not entitled to relief.

The judgment is affirmed.

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125	517
49	428
134	146
49	428
141	479

PLEADING.—Written Instrument.—In an action to set aside a deed and have it declared void, on the ground of fraud or undue influence in procuring its execution, or unsoundness of mind of the grantor, the deed is not the foundation of the suit, and need not be made a part of the complaint.

FRAUD.—False Representations to Induce Execution of Deed.—Husband and Wife.—Representations made by a second wife to her husband, who was of sound though feeble mind, that a certain person intended to bring a slander suit against him, and that his property would be swept away, that his children had turned against him, and were conspiring to deprive him of his property, and that she alone was true to him, and that his granddaughters were of bad character and not fit to be entrusted with his property, were not sufficient to set aside a deed made by the husband, by which his property was vested in said wife.

SAME.—Misrepresentations that will constitute fraud must be concerning a material fact, and not merely the expression of an opinion or a representation concerning matters equally within the knowledge of both parties.

From the Switzerland Circuit Court.

C. E. Walker, H. W. Harrington, C. A. Korbly, and W. S. Roberts, for appellants.

J. A. Works and J. D. Works, for appellee.

PETTIT, J.—This suit was brought by the appellee, Thomas Jagers, and Joseph Jagers, against the appellants, Hannah Jagers, William Hall, and Sarah Hall, his wife, and the following is the complaint in full:

“Thomas Jagers and Joseph Jagers complain of Hannah Jagers, William Hall, and Sarah Hall, and say that on the 10th day of February, 1870, Thomas Jagers, Sr., was the owner in fee simple, and had been for years, of the following described real estate in Switzerland county, in the State of Indiana, to wit:” (here is described the real property); “that he was also the owner of a great amount of personal property, horses, wagons, and farming implements, and other property; that on the 10th day of February, 1870, he and the defendant Hannah Jagers conveyed the above described real estate and all the personal property they or either of them owned to the defendant William Hall, by deed, a copy of which is filed

herewith, marked 'Exhibit B,' and made a part of the complaint; that at the time of making said conveyance, the said Thomas was seventy years of age, greatly debilitated and enfeebled in body and mind, to such an extent that he was easily influenced by the said Hannah Jagers; and plaintiffs allege that said deed was procured to be made by the fraud, misrepresentation, and undue influence of the said Hannah Jagers; that the said Hannah Jagers falsely and fraudulently represented to the deceased, that one Charles H. Thiebaud intended bringing suit against him for slander, and that all of said property would be swept away, and pass into the hands of strangers; and further represented to said deceased, that his children had all turned against him, and were conspiring against him to deprive him of his property, and that she alone was true to him, and that the daughters of the plaintiff, Thomas Jagers, Jr., were of bad character, and not fit persons to be entrusted with his property; and plaintiffs allege, that said Hannah Jagers made said representations, knowing them to be wholly without foundation and false; and that she made them for the sole purpose of inducing the said Thomas Jagers, Sr., to make said conveyance; and that the said deceased believed that the said representations so made by her were true; and that he was thereby induced to make said conveyance; and that he would not have made the same, had not such representations been made; that said deed was wholly without consideration, and that the consideration named in said deed was never paid either in whole or in part, but that said conveyance was procured to be made by the said defendant Hannah Jagers, wrongfully and fraudulently and to the injury of the plaintiffs herein, by the false and fraudulent representations aforesaid, for the purpose of having said land and personal property conveyed back to herself. And plaintiffs further allege, that on the 14th day of February, 1870, the defendants William Hall and Sarah Hall, his wife, conveyed said land and personal property to the defendant Hannah Jagers by deed, a copy of which is filed herewith and made a part of this complaint, marked 'Exhibit C;' that said deed

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was wholly without consideration; that the consideration therein named was never paid, either in whole or in part, but was made to said defendant for the purpose of carrying out the fraudulent and wrongful purpose of possessing herself of said property, and for no other or different consideration.

“Plaintiffs further allege, that said Thomas Jagers, Sr., departed this life on the — day of —, leaving as his heirs at law the plaintiffs, Thomas Jagers and Joseph Jagers, and the defendant Hannah Jagers; that the said Thomas and Joseph are entitled to one-half of said property each, subject to the interest of the said Hannah Jagers, which is a life interest in the one-third thereof; wherefore they ask that said deeds of conveyance be set aside, and that said real estate be partitioned, and for all other proper relief.

“Par. 2. For second paragraph, plaintiffs say that on the 10th day of February, 1870, Thomas Jagers, Sr., was the owner of the real estate and personal property described in the first paragraph of this complaint, and that on said day he conveyed the same to the defendant William Hall by deed, a copy of which is filed herewith and made a part of this paragraph, marked ‘Exhibit B;’ and plaintiffs say that at the time of making said deed, the said Thomas Jagers, Sr., was of unsound mind and wholly incapable of making a valid contract. And they say further, that on the 14th day of February, 1870, the defendants William Hall and Sarah Hall, his wife, conveyed said real estate and personal property to the defendant Hannah Jagers; and they further allege, that the said Thomas Jagers, Sr., died on the — day of —, and that he left as his heirs at law the defendant Hannah Jagers, who is entitled to a life interest in the one-third of said real estate, and the plaintiffs, Thomas Jagers and Joseph Jagers, who are each entitled to the one-half thereof, subject to said life interest; wherefore they ask that said deeds be set aside and declared void, and that said real estate be partitioned, and for all proper relief.”

A separate demurrer, for want of sufficient facts, to each

paragraph of the complaint was overruled, exception taken, and this ruling is assigned for error.

The deeds, which are filed with and said to be made a part of the complaint, were not legally a part of the complaint, because they were not the foundation of the action. The foundation of the action was the alleged fraud, misrepresentation, and undue influence of Hannah Jagers, in procuring the execution of the deed from Thomas Jagers, Sr., to Hall, and the unsoundness of mind of the grantor at the time of making the deed by Thomas Jagers, Sr.

On the trial of the cause, the jury expressly found, that at the time of the execution of the deed to Hall, Thomas Jagers, Sr., was of sound mind. This effectually disposes of the second paragraph of the complaint, which only charges unsoundness of mind at the time of executing the deed, and brings us to the consideration of the sufficiency of the first paragraph of the complaint. The material allegations of it are these:

“That at the time of making said conveyance, the said Thomas Jagers was seventy years of age, greatly debilitated and enfeebled in body and mind, to such an extent that he was easily influenced by the said Hannah Jagers. And plaintiffs allege that the said deed was procured to be made by the fraud, misrepresentation, and undue influence of the said Hannah Jagers; that the said Hannah Jagers falsely and fraudulently represented to the deceased that one Charles H. Thiebaud intended bringing suit against him for slander, and that all of said property would be swept away and pass into the hands of strangers; and further represented to said deceased, that his children had turned against him and were conspiring against him to deprive him of his property, and that she alone was true to him; and that the daughters of the plaintiff, Thomas Jagers, Jr., were of bad character, and not fit persons to be entrusted with his property.”

As we have held above that the deeds filed with the complaint formed no part of it, as the action was not based upon them, there is no allegation in the complaint that she held any relation whatever to him. It does not show that she was a first

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or second wife, mother, sister, daughter, or servant, or had or held any close or confidential relation to him that would be likely to give her an influence over him. Nor does the allegation that she was entitled to a life estate in one-third of the lands show any such relation or confidential position; for she might have had this interest in the lands by other means or ways than being a second wife, without a child by him. But if we concede that she was his second wife and had no child by him, do the facts charged show such fraud, misrepresentation, or undue influence as would enable him to set aside the deed? If he could not do it in his lifetime, his heirs cannot after his death, for they can have no more rights than he had to, and did leave them at his death.

He was of sound though feeble mind. Feebleness of mind has never been held sufficient to set aside a deed, where the grantor was of sound mind, though some of the authorities hold that it may be taken into consideration, in connection with other circumstances, for that purpose; but no other circumstances are stated in the complaint.

Some of the authorities, while they admit that undue influence is generally fraud, hold that there may be undue influence without fraud, as in the case of great fondness, friendship, flattery, and persuasion. If these pretences, however, are false, they constitute fraud.

In this case, there is no such pretence or allegation. All the charges of fraud, misrepresentation, and undue influence in the complaint must be held as intending to charge fraud. Were they such representations as a man of sound though feeble mind had a right to rely on? and could he set aside his deed for or on account of them? We think not. She told him that Thiebaud intended to bring a slander suit against him, and that his property would be swept away; that his children had turned against him, and were conspiring against him to deprive him of his property, and that she alone was true to him; that his granddaughters (children of one of the plaintiffs) were of bad character, and not fit persons to be entrusted with his property. These are all the acts that she

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is charged with doing, and we think they are not enough to set aside a deed made by a man of sound though weak mind. Misrepresentation must be concerning a material fact, and not merely the expression of a matter of opinion or representation concerning matters equally within the knowledge of both parties. *Foley v. Cowgill*, 5 Blackf. 18; *Barton v. Simmons*, 14 Ind. 49; *Cronk v. Cole*, 10 Ind. 485; Kerr Fraud & Mistake, 77, note 1. There is nothing to show that he could not or did not know the truth or falsity of these matters as well as she. Bouv. Law Dict., vol. 1, 613, says:

“While, on the one hand, the courts have aimed to repress the practice of fraud, on the other, they have required that before relieving a party from a contract on the ground of fraud, it should be made to appear that on entering into such contract he exercised a due degree of caution. *Vigilantibus, non dormientibus, succurrunt leges*. A misrepresentation as to a fact, the truth or falsehood of which the other party has an opportunity of ascertaining, or the concealment of a matter which a person of ordinary sense, vigilance, or skill might discover, does not in law constitute fraud. Misrepresentation as to the legal effect of an agreement does not avoid it as against a party whom such misrepresentation has induced to enter into it—every man being presumed to know the legal effect of an instrument which he signs or of an act which he performs.”

The case was dismissed as to Joseph Jagers, and was prosecuted by Thomas Jagers, and is, therefore, properly here in his name only.

The first paragraph of the complaint was insufficient, and the demurrer should have been sustained to it.

The judgment is reversed, at the costs of the appellee, with instructions to sustain the demurrer to the first paragraph of the complaint, and for further proceedings.

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49	434
137	110
138	186
49	434
146	348

PROMISSORY NOTE.—*Trustee of an Express Trust.*—*Estoppel.*—Where the payee of a promissory note brought suit upon it in his own name, and the note on its face showed that it was for the use and benefit of another, and it was objected that the plaintiff was not the real party in interest, and he failed to amend his complaint by showing that he was the real owner of the note, and on appeal to the Supreme Court it was held that he was the trustee of an express trust, and in that capacity had a right to maintain the action, he could not afterward, in a proceeding to set off, against the judgment on the note, a judgment held by the maker of the note against the person for whose use and benefit the note was given to said payee, be allowed to plead that the note was really his own and free from any trust.

SAME.—*Reformation of Note After Judgment.*—After judgment upon a promissory note, it cannot be reformed.

WRITTEN INSTRUMENT.—*Reformation of.*—To entitle a party to the reformation of a written instrument, it must be clearly and satisfactorily shown that there was a mistake of fact, and not of law. It must be shown that words were inserted which were intended to be left out, or that words were omitted which were intended to be inserted.

SAME.—A mistake as to the legal effect of words inserted designedly in a written instrument gives no right to a reformation of such instrument.

SET-OFF.—*Judgment Against Judgment.*—A judgment in one court may be set off against a judgment in another court.

SAME.—Against a judgment obtained by the trustee of an express trust may be set off a judgment against the person for whom the trust is held.

From the Hendricks Circuit Court.

W. A. McKenzie, for appellant.

L. M. Campbell, for appellee.

BUSKIRK, J.—The voluminous character of the pleadings and the evidence renders it necessary that we should summarize the facts and condense the pleadings.

On the 21st day of April, 1869, Alfred Mondy recovered a judgment in the Hendricks Circuit Court against Allen Heavenridge, for the sum of two hundred and fifty-four dollars and seventy cents, upon a note, in the words and figures as follows:

“STILESVILLE, Sept. 1st, 1867.

“Six months after date, I promise to pay A. Mondy (for

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Wm. Mondy) or order, two hundred and twenty dollars, with interest at ten per centum per annum. Value received, without any relief whatever from valuation or appraisement laws.

“ A. HEAVENRIDGE.”

Heavenridge appealed to this court, and asked for a reversal of the judgment, mainly upon the ground that William Mondy was the real party in interest, and that he alone could maintain an action on the note. After careful consideration, it was held, that “as the note sued upon was made for the use of William Mondy, this action might have been prosecuted in his name under the third section of article 2 of our code; but as it is payable to Alfred Mondy, for the use and benefit of William Mondy, it thereby makes Alfred Mondy the ‘trustee of an express trust,’ and the suit is properly prosecuted in his name under the fourth section above quoted.” 34 Ind. 28.

The judgment was in all things affirmed, and after a re-examination of the question, a petition for a rehearing was overruled.

On the — day of October, 1871, Allen Heavenridge obtained, in the Hendricks Common Pleas, a judgment against William Mondy, in the sum of six hundred and eighty-five dollars and twenty cents.

After the judgment of affirmance in the case of *Heavenridge v. Mondy, supra*, was filed in the court below, Heavenridge proceeded by motion and notice to have his judgment against William Mondy, or so much thereof as might be necessary, set off against the above mentioned judgment in favor of Alfred Mondy against him.

William Mondy made default. Alfred Mondy appeared and filed an answer in three paragraphs and a cross complaint. A demurrer was sustained to the first and second and overruled to the third and cross complaint, to the overruling of which the appellant excepted, and has assigned such ruling for error here.

The plaintiff filed an answer to the cross complaint, consisting of six paragraphs, and a reply in denial of the third paragraph of the answer.

The first paragraph of the answer to the cross complaint

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will be noticed hereafter. The other paragraphs were, in substance, the same as the answers filed in the original action of Alfred Mondy against Heavenridge, and being wholly immaterial and irrelevant in this action, need not be further noticed.

Alfred Mondy filed a reply, in two paragraphs, to the answer to the cross complaint. The first was in denial. The second was to all the paragraphs of the answer except the first, and alleged, in substance, that all the matters and things therein averred and set forth had been fully tried and determined in the original action between Alfred Mondy and Heavenridge, as would fully appear by the record thereof, etc.

The cause was submitted to the court for trial, and resulted in a finding in favor of the appellees. The court, over a motion for a new trial, rendered judgment on the finding, and this ruling is assigned for error here.

The substance of the third paragraph of the answer is, that Alfred Mondy, long before the rendition of said judgment of Heavenridge against William Mondy, and before the execution of the note on which it was rendered, and without any notice or knowledge of said note or judgment, or the existence of any debt of the said William Mondy to the said Heavenridge, had, as between himself and said William Mondy, executed his supposed trust, and had paid and advanced to said William Mondy all sums of money which might become or were due from him, as said supposed trustee, to the said William Mondy.

The cross complaint was against appellant and William Mondy, and alleged, in substance, that the said William Mondy had not then, nor had he had at any time since the execution of the note of the said Heavenridge to Alfred Mondy for two hundred and twenty dollars, any right or interest therein or in the debt or judgment of him the said Alfred against the said Heavenridge; but the said Alfred Mondy, on the contrary, averred and charged the truth to be, that by agreement between himself and the said William Mondy and the said Heavenridge, at the time of the execution of the note

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for two hundred and twenty dollars, the said Heavenridge assumed and agreed to pay to him the said Alfred the said sum of money, being the amount then due from said William to said Alfred; that the said Alfred released the said William for said sum, and said William gave Heavenridge credit for said sum in their dealings; that at the special instance and request of the said Heavenridge, who desired to have time for the payment of the same, said Alfred Mondy agreed to take said note to himself, and to extend time for the accommodation of said Heavenridge; that said Heavenridge wrote said note, and inserted the words "for William Mondy," as he said, as a memorandum to show, when taken up, that he had settled that amount for said William, and not to constitute the said Alfred a trustee, or to show that William had any interest therein; that it was for said reason and by mistake of said parties as to the legal effect thereof that the name of William Mondy was embraced therein; and not knowing the legal effect of said note as written by the said Heavenridge, the said Alfred Mondy accepted the same in its present form and released the said William, and relied solely upon the collection of said sum from said Heavenridge; all of which was before the existence of the indebtedness of said William to said Heavenridge, which is asked to be set off. The prayer was, that the said William and Heavenridge be required to make full answer, and that the said note be reformed to correspond with the real transaction between said parties, and for general relief.

The third paragraph of the answer and the cross complaint are subject to the same objection, and on such point will be considered together.

It is to be noted that the application to set off the judgments was made in the circuit court, in the case of *Mondy v. Heavenridge*, after it had been remanded, and before the opinion of this court had been spread upon the record. The obvious purpose of the answer and cross complaint under examination was to show that the note, on which the judgment in favor of Mondy against Heavenridge was founded, belonged to Alfred

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Mondy, and hence that he was the real party in interest. This could not be done in the face of the record in said cause. Alfred Mondy accepted of a note which, on its face, showed that he was the trustee of an express trust; in other words, that the note was payable to him for the use and benefit of William Mondy. He held the legal title, while the beneficial interest was in William. He instituted suit on such note in his own name, and when it was objected that he was not the real party in interest, he failed to amend his complaint by showing that he was in fact the real owner of the note, but took judgment in his own name. On appeal to this court, the judgment was affirmed, upon the ground that he was the trustee of an express trust, and that, in that capacity, he had the right to maintain the action. By that decision, it was settled that William Mondy was the real party in interest, and consequently was the beneficial owner of the note and judgment rendered thereon. That is the law of the case.

It was held by this court, in *Hawley v. Smith*, 45 Ind. 183, that when the Supreme Court has laid down a rule of law, it will adhere to it in a subsequent action between the same parties, where a different decision would leave one party without remedy, even though doubtful of the correctness of the rule when applied to other cases. We, however, entertain no doubt as to the correctness of our ruling in such case. It is fully supported by authority and on principle, and was unquestionably demanded by the express language of the statute, on which it was mainly grounded. The ruling in that case has been adhered to in several subsequent cases: *The North-Western Conference, etc., v. Myers*, 36 Ind. 375; *Brooks v. Harris*, 42 Ind. 177; *Wiley v. Starbuck*, 44 Ind. 298; *Washington Township v. Bonney*, 45 Ind. 77.

The cross complaint was fatally defective upon another ground. It sought a reformation of the note, which was the foundation of the action. The application came too late. The note was merged in the judgment, and hence could not be reformed.

Besides, the averments of the cross complaint were wholly

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insufficient to entitle the appellee to a reformation of the note, if it had not been merged in the judgment. It is settled law, that to entitle a party to the reformation of a written instrument, it must be clearly and satisfactorily shown that there was a mistake of fact, and not of law. It must be shown that words were inserted that were intended to be left out, or that words were omitted which were intended to be inserted. *Nelson v. Davis*, 40 Ind. 366; *Allen v. Anderson*, 44 Ind. 395; *Baldwin v. Kerlin*, 46 Ind. 426.

It is expressly averred in the cross complaint, that the said note was accepted "by mistake of said parties as to the legal effect of said note." A mistake as to the legal effect of words inserted designedly in a written instrument gives no right to a reformation of such instrument.

The court erred in overruling the demurrer to the third paragraph of the answer and the cross complaint.

We have passed upon the sufficiency of the answer and cross complaint as if pleadings were necessary, though it was decided in *Brooks v. Harris*, *supra*, that pleadings were not contemplated by the statute.

We next inquire whether the court erred in overruling the motion for a new trial.

The only point relied upon is, that upon the evidence the finding should have been for the appellant. The cause was submitted to the court upon the complete transcript of the record in the case of *Mondy v. Heavenridge*, including the opinion of this court affirming the judgment of the court below, and the judgment in favor of Heavenridge against William Mondy.

The appellees offered no evidence whatever in support of the third paragraph of the answer or the cross complaint. The case, therefore, stands solely upon the legal effect of the judgment in such case.

It was held, in *Hill v. Brinkley*, 10 Ind. 102, that a judgment in one court may be set off against a judgment in a different court.

In *Hawk v. Meloy*, 26 Ind. 176, it was said that the ruling

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in the above case was *obiter*. But in *Brooks v. Harris*, 41 Ind. 390, the case of *Hill v. Brinkley*, *supra*, was adhered to and followed; and it was held that the fact that the judgments were rendered in different courts does not take away the right to have the set-off made. It was also held, that under the general principles of our law on the subject of set-off, there must be mutuality in the claims in order that they be set off against each other.

In a suit by a trustee, who sues for the use or benefit of another, a debt due the defendant by the trustee personally cannot be set off. *Flournoy v. The City of Jeffersonville*, 17 Ind. 169. The reason is, that the trustee has no beneficial interest in the cause of action. The reason for excluding the set-off against the trustee would make it admissible when the debt is due from the beneficiary, "the real party in interest."

The right of set-off in such a case as the present is clearly recognized in *Jones v. Hawkins*, 17 Ind. 550.

In *Waddle v. Harbeck*, 33 Ind. 231, it was held that in a suit by a trustee, the defendant may set off a debt due him from the *cestui que trust*.

In *Brooks v. Harris*, 41 Ind. 390, it was held that there must be mutuality in the claims, in order that they may be set off against each other; but where a judgment has been obtained, on the relation of A., against B. and his sureties, on a constable's bond, B. may have a judgment obtained by him against A. set off against the judgment on the bond.

In the case of *Wright v. Cobleigh*, 3 Foster N. H. 32, it was held: 1. That courts of law have power to set off mutual judgments. 2. The set-off is made between the real and equitable owners of the judgment, and not between the nominal parties. 3. If the defendant against whom a judgment is recovered is the assignee and equitable owner of an ascertained part of a judgment recovered against the plaintiff in the name of another person, that part may be set off against the plaintiff's judgment.

In the present case, William Mondy is the beneficial owner

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of the judgment against the appellant, and we think the right of set-off exists.

The judgment is reversed, with costs; and the cause is remanded for another trial, in accordance with this opinion.

FOUNTAIN v. DRAPER.

LIQUOR LAW OF 1873.—Sixth Section.—Under the sixth section of the act to regulate the sale of intoxicating liquors (Acts 1873, p. 151), it is unlawful to sell, barter, or give intoxicating liquors to any person in the habit of becoming intoxicated, and such person need not be intoxicated at the time the liquor is furnished.

SAME.—Twelfth Section.—Suit by Wife for Damages.—What She Must Establish.—In a suit brought by a wife under the twelfth section of the act to regulate the sale of intoxicating liquors (Acts 1873, p. 151), it is necessary, in order to entitle her to recover, to establish the following: 1. The intoxication of her husband, habitual or otherwise. 2. That she has been injured in person or property, or means of support, in consequence of such intoxication. 3. That the intoxication from which the injury resulted was caused, in whole or in part, by the selling, bartering, or giving of intoxicating liquors to her husband by the defendant.

SAME.—Liability for Damages.—Each person who by selling, bartering, or giving intoxicating liquors, contributed in part to the intoxication causing the injury complained of, is liable for the full extent of the injury; and all such persons may be joined, or any one may be sued.

From the Benton Circuit Court.

R. C. Gregory, W. B. Gregory, and R. P. DeHart, for appellant.

J. R. Troxell, P. H. Ward, W. H. Graham, R. S. Dwiggins, and Z. Dwiggins, for appellee.

DOWNEY, J.—Suit by the appellee against the appellant. The venue was changed from Jasper county, where the action was commenced, to Benton county, where it was tried. The complaint states the following facts: That the plaintiff is the wife

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of William Draper; that she resides with her husband in the town of Remington, in Jasper county, Indiana; that the defendant also resides in said town, and does business there; that his business is and has been for more than a year last past that of saloon keeper; that the defendant kept and still keeps intoxicating liquors for sale in his saloon; that the husband of this plaintiff is in the habit of drinking intoxicating liquors and becoming intoxicated, which was and is well known to the defendant; that in March, 1873, the plaintiff notified the defendant that her husband was in the habit of becoming intoxicated, and notified and requested him not to sell or give her said husband any intoxicating liquor whatever; that the defendant, well knowing from his own personal knowledge, as well as from the notice given to him by the plaintiff, that the husband of plaintiff was in the habit of becoming intoxicated whenever he could procure liquor, and disregarding the notice and request of the plaintiff, did, on the 1st day of March, 1873, and on divers other days and times between that time and the present, sell, barter, and give intoxicating liquors to the said husband of this plaintiff, thereby causing the intoxication of the husband of the plaintiff.

It is further alleged, that the husband of the plaintiff, by reason of said intoxication, caused by the defendant aforesaid, failed to provide for and maintain the plaintiff and her children; that her said husband, by reason of said intoxication, would not and did not work or make any exertion to procure means for the support and maintenance of the plaintiff and her children; that her said husband, by reason of said intoxication caused as aforesaid, squandered and wasted his property and means, not leaving anything for the support and maintenance of the plaintiff and her children; that her said husband, while in a state of intoxication caused by the acts of the defendant as aforesaid, struck, beat, and wounded the plaintiff, and did curse, abuse, beat, and wound her and her children, and used profane and obscene language in the presence and hearing of her and her children, and otherwise abused and ill-treated her and her children; that all of said beating, striking,

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wounding, cursing, and other abuse of the plaintiff by her said husband was caused by the aforesaid intoxication ; by reason of all of which plaintiff says that she has been damaged in the sum of two thousand dollars ; wherefore she demands judgment against said defendant in the sum of two thousand dollars, and all other proper relief.

The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. His demurrer was overruled, and he excepted.

An issue of fact was then formed by a general traverse of the complaint.

This issue was tried by a jury, and there was a verdict for the plaintiff, awarding her damages in the sum of three hundred and twenty-five dollars.

The defendant moved the court for a new trial, for the reasons following :

1. Because the damages are excessive.
2. Because the verdict of the jury is not sustained by the evidence.
3. Because the verdict of the jury is contrary to law.
4. Because the court misdirected the jury in giving them instructions numbered one, two, and three.

These instructions are set out in the written motion. This motion was overruled, as was also a motion in arrest of judgment, and final judgment was rendered for the plaintiff for the amount of the verdict.

The errors assigned are the overruling of the demurrer to the complaint, the refusal to grant a new trial, and overruling the motion in arrest of judgment. The first and last assignments present but one question, that is, as to the sufficiency of the complaint.

Counsel for appellant, in their brief, say the action is brought under sections 8 and 12 of the act—that of February 27th, 1873, Acts 1873, p. 151.

Counsel for appellee state that the action is founded on the twelfth section of the act. We do not perceive that the eighth section has any reference to the case made by the complaint,

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and we shall therefore examine the questions with reference to the twelfth section.

The eighth section makes the person selling intoxicating liquor liable to pay a compensation to any person taking care of the intoxicated person.

The twelfth section of the act provides, that "in addition to the remedy and right of action provided for in section 8 of this act, every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name, severally or jointly, against any person or persons who shall, by selling, bartering, or giving away intoxicating liquors, have caused the intoxication, in whole or in part, of such person," etc. By the same section, a married woman is given the same right to bring suit and control the same and the amount recovered as an unmarried woman, and it is declared that the suit for damages may be by any appropriate action in any of the courts of the State having competent jurisdiction, and that all such judgments may be enforced without any relief from valuation laws.

The only objection to the complaint, considered with reference to the twelfth section of the act, made by counsel for the appellant, is, that the section has reference to unlawful sales only; otherwise, it is said, you make the legislature provide a penalty for doing that which they make lawful by a permit. The complaint, it is said, does not show that the sales were unlawful; does not aver that the husband was in a state of intoxication at the time of the sale, barter, or gift.

If it be conceded that the position of counsel is correct in a legal view, still it is incorrect in point of fact, for the sales are shown, by the averments of the complaint, to have been illegal. It is averred in the complaint, that the defendant was notified, and that he knew of his own knowledge, "that the husband of the plaintiff was in the habit of becoming intoxicated whenever he could procure liquor," and that the defend-

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ant sold, bartered, and gave him intoxicating liquors in disregard of the notice and request of the plaintiff.

It was not necessary that the husband of the plaintiff should have been in a state of intoxication when he procured the liquor of the defendant, in order to make the sales, etc., illegal. It was unlawful under the sixth section of the act to sell, barter, or give intoxicating liquors to any person who was in the habit of becoming intoxicated. The court committed no error in overruling the demurrer to the complaint.

We are next to consider the question relating to the overruling of the motion for a new trial. As the sufficiency of the evidence to justify the verdict of the jury is drawn in question, we will set forth the substance of it, on both sides:

Helen M. Draper, the plaintiff, testified, after stating her name, residence, and relation to the action, as follows: William Draper is my husband; I have lived at Remington nearly two years; my husband has lived there nearly that long, clerking in Mr. Bowles' store; we have five children, four girls and one boy; their ages are, boy, fourteen, girls, twelve, eight, five, and two and a half years; I am acquainted with the defendant; he lives at Remington, and keeps a saloon; that has been his business during the last year; my husband was intemperate in March last; he has been more or less intemperate ever since we came to Remington, two years ago; he never struck me but once; that was when he went to whip one of the little girls, and I interfered; he was intoxicated at the time; I visited the defendant's saloon in November last (1872) with Penfield Bowles; I notified the defendant not to sell any liquor to my husband; he said he would not; after the new law came out, I wrote the defendant a note, telling him not to sell my husband any liquor, and that if he did I would avail myself of the provisions of sections 8 and 12 of the law; I sent this note and a copy of the law to the defendant by Mr. Penfield Bowles; he delivered it to him; I do not know of defendant's selling my husband any liquor since the 1st of March; between the 1st of March and the latter part of July, my husband was intoxicated the greater

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part of the time ; when sober he was a good man, and would do his best ; when intoxicated, he would curse and swear and use obscene language in the presence of myself and the children ; he usually came home early in March and April last ; once he stayed out all night, and once he came home about one o'clock ; would come home intoxicated ; defendant knew of his habits ; I told him.

On cross-examination, she testified that the saloon of the defendant was not the only place in Remington where liquor was sold ; there were two drug stores and one other saloon ; I heard that Rawlings kept a barrel of liquor ; Mr. O'Conner kept the other saloon ; Mr. Ford did keep a saloon there till about the middle of July last ; my husband was very profane when drunk ; he never swore at home when sober ; he struck me with his hand ; he was whipping one of the little girls, and I interfered ; he never hurt me any ; he brought some gin and other liquors home to me ; I do not know anything about where he got it ; they sell liquor at the drug stores for medical purposes ; I do not know of any person selling to my husband.

Penfield Bowles testified as follows : I am acquainted with the parties to this suit, and know William Draper ; he clerked for me in my store at Remington ; I discharged him in October last, about a month ago (the trial was in November, 1873) ; he was intoxicated once or twice a week from March to July ; he is all right when sober ; when he is drunk, he uses profane language ; I went with Mrs. Draper last fall to the drug stores and saloons and notified them not to sell Draper any liquor ; the defendant said he would not ; I delivered a note and a copy of the new law to Mr. Fountain for Mrs. Draper in February or March last ; in April or May I saw Draper in Fountain's saloon paying for a bottle of gin ; I could not say that I have seen Draper drink there since the 1st of March ; saw him drink beer there before that time ; I tasted of the gin.

On cross-examination, he said : Mrs. Draper is my cousin ; saw Draper have the gin, and saw him hand money to Fountain, and inferred from that he was paying for the gin ; I think

Fountain knew of Draper's habits; he has been intoxicated in Fountain's place of business; I have taken him out.

Patrick Lully testified that he resided at Remington; that he was acquainted with the parties to the suit, and with William Draper, husband of the plaintiff; that defendant kept a saloon from 1st of February to July; saw Draper drunk in March and April; saw him get beer at Fountain's along in the winter and spring; cannot tell just when it was; supposes he has seen him get a package there since the 27th of February; they were bottles of gin; saw him get it there last winter or fall; they called it soap; I suppose I have seen Draper get beer there five or six times since February; have seen Draper drink beer there when he was intoxicated; I call November, December, January, February, and March winter; I suppose I speak by the weather, not by the months; I know I saw him drink beer there last winter, but I can't tell when; it was in the winter, and, I suppose, as late as February; I never saw him get any gin there since February; I saw him get gin at Bowles' store; it is only guess-work with me when I say February, March, and April; I know it was in April; I was a candidate for marshal, and had to treat, and saw him there; election was first Monday in May; saw Draper get beer there at that time, in April last, and saw him get a bottle of gin there in the same month.

Emma Stewart: Had lived in Draper's family within the last year; have seen him intoxicated several times when there; he came home one night drunk and went up stairs to whip the little girl, who was crying with the toothache; Mrs. Draper interfered; that was last fall, in 1872.

Ruby Babcock: Went to Draper's 1st of last December, and remained there until April; during that time Draper came home drunk two or three times a week; he was abusive and used profane language; he was not abusive in any other way.

Ambrose Ford, on behalf of defendant, testified that he lived in Remington last summer, and kept a saloon there from December to May or June; I know the defendant, and also

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William Draper ; Draper got liquor most anywhere then ; I saw him get a bottle of gin of Mr. O'Conner ; I let him have a drink of gin, and was fined for it ; I kept gin for sale ; they kept it at the drug stores ; I have seen Fountain refuse to let Draper have liquor ; he told him he would not let any person have liquor who got drunk ; have drank gin with Draper at Bowles' store ; don't know what kind of gin Draper got of O'Conner ; at Bowles' store he got the gin from behind the counter, where he had it in a bottle.

Jared H. Fountain, the defendant, testified as follows : I have lived at Remington about five years ; I was notified some time last fall or winter by the plaintiff not to sell liquor to William Draper ; Mr. Bowles gave me a note and a copy of the new law ; the note was from Mrs. Draper ; I sold Draper a bottle of gin some time in the spring ; he came in and said he had agreed to get a bottle of gin to take home to his family ; that his wife was sick with the ague, and he did not feel well himself, and he had promised to get it for medicine ; I believed what he said, and let him have it ; he was sober when he got it ; I have never sold or furnished any liquor to Draper but that one time since I was notified not to do so ; I sold "Imperial Gin ;" never sold any "London Dock."

Was this evidence sufficient to justify the verdict of the jury ? Under that part of the twelfth section which relates to this action, and which we have already set forth, where the wife sues on account of the intoxication of her husband, she is required to establish the following propositions :

1. The intoxication of her husband, habitual or otherwise.
2. That she has been injured in person or property or means of support in consequence of such intoxication.
3. That the intoxication from which the injury resulted was caused, in whole or in part, by the selling, bartering, or giving intoxicating liquors to her husband by the defendant.

The evidence abundantly establishes the first proposition, that is, the intoxication of the husband. It is sworn to by nearly all the witnesses who testified in the cause.

The evidence in support of the second proposition is not so

clear. The law took effect at its approval, in consequence of an emergency clause, on the 27th day of February, 1873. The action having been authorized by that law, nothing which occurred before the date of its enactment can furnish a cause of action under it. The circumstance of the husband's striking his wife seems to have occurred in the fall of 1872, before the act was passed, according to the testimony of Emma Stewart, who is the only witness fixing a date to that transaction. It does not clearly appear whether the husband was discharged by Bowles on account of his habits of intoxication or not. Bowles says he discharged him in October before the trial, but does not state the reason for so doing. Possibly, it may properly have been inferred by the jury that he was discharged for this reason, as Bowles speaks of him as "all right when sober." He was almost continually intoxicated in the spring and summer of 1873, and we think the wife must have been injured in her means of support and personal comfort and quiet by the waste of his money and time, and his unkind conduct and obscene language.

There is evidence from which the jury might find the truth of the third proposition. It was not necessary that the intoxication of the husband should have been produced solely by the liquors sold, bartered, or given to him by the defendant. It seems clear that others, as well as the defendant, sold liquors to the husband. But this is not material. They might have been joined with the defendant in the action, or he might be sued alone. The statute authorizes the action to be brought severally or jointly against those who sell, barter, or give the liquor. The statute does not contemplate an apportionment of the damages among those who sell the liquors which produce the intoxication. Each one is liable to the full extent of the injury.

Counsel, in their brief, complain of the giving of the following instructions: "That if the husband of the plaintiff was a man who was in the habit of becoming intoxicated, any sale, barter, or gift of intoxicating liquors made to him by the

Fountain v. Draper.

defendant, to be used by him as a beverage, after the defendant had notice of his habit, would be unlawful, if made during the time charged in the complaint.

“If you find that the plaintiff was injured in her means of support on account of the intoxication of her husband, caused in whole or in part by the defendant’s unlawfully selling, bartering, or giving him intoxicating liquors, you may give her such damages for this injury as you may think from the evidence will be a reasonable compensation to her for the same.”

Counsel say: “The ground we take is, that the eighth and twelfth sections must be read together, for the reason that the twelfth section provides, that ‘in addition to the remedy and right of action provided for in section 8 of this act, every husband, wife,’ etc. The ‘sale’ is the thing provided against, and the twelfth section does not enlarge the thing provided against, by providing against whom the action may be brought.” The position of counsel, as we understand it, is, that the instructions of the court are wrong, because they inform the jury that “evidence of a bartering or giving of the liquor will sustain the case, as well as evidence of a selling.”

We have already said, in speaking of the complaint, that we do not think the case depends upon the eighth section of the act to any extent. We think the action in this case is authorized by the twelfth section alone. That section, as we have seen, relates to intoxication produced by liquors obtained by “selling, bartering, or giving away.” There is nothing in the objection made to the instructions.

We cannot say that the damages are excessive.

The judgment is affirmed, with costs.

Everroad v. Flatrock Township.

EVERROAD v. FLATROCK TOWNSHIP.

OFFICE.—Township Trustee.—Term of Office.—The power and authority of an outgoing township trustee ends when his successor is elected and qualified.

SAME.—The term of office of an incoming township trustee commences when he is elected and qualified.

SAME.—When a new township trustee is elected and qualified, the former trustee is no longer an officer *de jure* or *de facto*.

OFFICER.—Contract.—A contract made by an officer as such after he has been superseded by a successor is invalid.

From the Bartholomew Circuit Court.

S. Stansifer, for appellant.

W. W. Herod and *F. Winter*, for appellee.

PERTIT, C. J.—This suit was brought by the appellant, Tilman F. Everroad, against Flatrock Township, in Bartholomew county, on a contract alleged to have been made by one Stoughton, as trustee of the township, with the plaintiff, for building a brick school-house in said township for the sum and price of one thousand seven hundred and fifty dollars. It is alleged in the complaint that Newton, the successor of Stoughton as trustee, refused to allow the plaintiff to build the house, and that the building would not have cost him more than one thousand dollars, and demands judgment for eight hundred dollars.

To this complaint, the defendant answered in three paragraphs, the third of which was as follows:

“3. For third and further answer herein, said defendant says that said Stoughton, who executed the contract sued on, assuming to be the trustee of defendant, was elected trustee of defendant on the general election held on the 11th day of October, 1870, for the term of two years and until his successor was elected and qualified; that on the 27th day of October, 1870, said Stoughton duly qualified as such trustee by taking the oath and giving the bond required by law in such matters; that he thereupon assumed and took upon himself the duties of said office; that on the general election held on the

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8th day of October, 1872, John Newton was duly elected the successor of said Stoughton as trustee of defendant, and on the 19th day of October, 1872, said Newton duly qualified as such trustee, by taking the oath and giving bond as required by law, which bond was, on said day, accepted and approved by the auditor of said county, and thereupon, to wit, on the 20th day of October, 1872, said Newton notified said Stoughton he had so qualified as trustee, and demanded of him all the records and papers of said office in his possession; that on the 26th day of October, 1872, and after more than two years had expired from October 11th, 1870, and after said Newton had qualified as such trustee, and after he had notified said Stoughton as aforesaid, and demanded said records and papers, said Stoughton, assuming to be still the trustee, but without authority in law or fact to do so, entered into and executed the contract sued on, which said contract, so far as it undertakes to bind defendant, is null and void, and defendant demands judgment."

To this paragraph of the answer, a demurrer for want of sufficient facts was overruled, and this ruling is assigned for error, and the following reply was filed to this paragraph of the answer, to which a demurrer for want of sufficient facts was sustained:

"The plaintiff, for reply to the third paragraph of answer, says: 1st. That when said Stoughton executed said contract as trustee of said township, two years had not expired since the date of his qualification as such trustee; that he qualified on the 27th day of October, 1870, and he executed the contract in suit on the 26th of October, 1872; and when he executed said contract, he was in possession of said office of trustee, performing all of the duties thereof, and he did not surrender said office or the books and papers thereof to said Newton until after the day on which said contract was executed, and said Newton did not in any manner enter upon the discharge of the duties of said office of township trustee until after said 26th day of October, 1872."

This answer and reply raise and present these questions:

Brent v. Oyler et al.

1. When does an outgoing officer's power and authority end?

2. When does an incoming, or a successor's, office commence?

3. Who is an officer *de facto*, and who is an officer *de jure*?

4. The validity of a contract made by an officer after he has been superseded by a successor.

These questions have been so fully considered by this court, in the cases of *Steinback v. The State, ex rel. Madison Township*, 38 Ind. 483, *Baker v. Kirk*, 33 Ind. 517, 523, 524, *Tuley v. The State*, 1 Ind. 500, 505, and *The Governor v. Nelson*, 6 Ind. 496, 499, showing that the answer was good and the reply bad, that we need only refer to those cases, without copying from them.

There is an assignment of a cross error by the appellee, but we do not think it necessary to pass upon it, as it did the appellee no injury, she having defcated the action against her.

The judgment is affirmed, at the costs of the appellant.

BRENT v. OYLER ET AL.

MORTGAGE.—Junior and Senior Mortgage.—Estoppel.—Right to Redeem.—A. conveyed certain real estate to B. and took from him a mortgage to secure unpaid purchase-money. B. thereafter conveyed the real estate to C. by a warranty deed and took from him a mortgage to secure two thousand dollars of unpaid purchase-money. B. then assigned the notes and mortgage made by C. to D., who then assigned the same notes and mortgage to E. Thereafter, A. sued to foreclose the mortgage made by B., and a judgment for three hundred and twenty-seven dollars and forty cents, and a decree of foreclosure, were obtained. C. was not a party to the suit, though his deed was of record. The real estate was sold, by virtue of the decree, for three hundred and ninety-four dollars and twenty-nine cents, to F., who thereafter assigned his certificate to E., who procured a deed for the property. Afterward, E.

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sued C. on the notes and mortgage made by C. to B., and C. succeeded in preventing a recovery by E., and obtained judgment in his own favor, on the ground of the former foreclosure of the mortgage held by A., and the sale of the real estate and the ouster and dispossession of C., and the consequent failure of the consideration for which he made his notes and mortgage to B. Subsequently, C. brought suit to redeem the real estate from the sale in favor of A., but did not offer to redeem from the mortgage and notes made by C. to B. E. set up the judgment in his case against C. as an estoppel against his claim to redeem.

Held, that C., not having been made a party to the suit of A. against B., had a right to redeem from such sale, but he abandoned his right, and became estopped from redeeming, by his failure to exercise such right until after he defeated the action of E., on the junior mortgage, on the ground of the failure of the consideration for which he had made the notes and mortgage, by reason of the foreclosure and sale on the mortgage of A.

From the Cass Circuit Court.

S. T. McConnell and *M. Winfield*, for appellant.

D. Howe, for appellees.

BUSKIRK, J.—The record in this cause discloses the existence of the following facts:

Previous to the conveyances hereinafter mentioned, Mary A. Heth, one of the appellees, who afterward became the wife of appellee Anthony F. Smith, conveyed the property in controversy to appellee Andrew G. Ritter, taking a mortgage to secure the unpaid purchase-money.

October 16th, 1867, Ritter conveyed by warranty deed to Nathaniel Brent, appellant, and took a mortgage to secure notes amounting to two thousand dollars, executed in part payment of the purchase-money.

October 29th, 1867, Ritter assigned the Brent notes and mortgage to one Chambers C. Hamilton.

November 10th, 1867, Chambers C. Hamilton assigned the Brent notes and mortgage to appellees Robert Hamilton and Samuel P. Oyler.

August, 1868, Mrs. Smith commenced suit in the Cass Circuit Court, on the Ritter notes and mortgage.

September 16th, 1868, she took judgment for three hundred and twenty-seven dollars and forty cents and for foreclosure.

The appellant was not made a party to the suit to foreclose the mortgage, though his deed was of record.

October 17th, 1868, the property was sold at sheriff's sale under Mrs. Smith's decree, and bid in for three hundred and ninety-four dollars and twenty-nine cents by appellee John Rottinger. Rottinger afterward assigned his certificate to Hamilton and Oyler, who, by virtue of the same, procured from the sheriff a deed for the property.

February 1st, 1869, Hamilton and Oyler began a suit against Brent, in the Cass Circuit Court, upon the notes and mortgage executed by him to Ritter. In this suit Brent, amongst other defences, pleaded an answer reciting the consideration of the notes, the mortgage by Ritter to Mrs. Smith, etc., and concluding as follows: "That the said Mary A. Smith commenced suit to foreclose the same, and obtained a judgment of foreclosure, and sold said property, and thereby this defendant was totally dispossessed and ousted of the possession of said premises, and has ever since been kept out of possession; wherefore defendant says that the consideration of said notes has wholly failed, and he prays that the same may be delivered up to him to be cancelled."

June 14th, 1870, there was a trial of the suit of *Hamilton and Oyler v. Brent*, and a general finding and judgment rendered for the defendant, Brent.

In 1870, Hamilton conveyed all his interest in the property to Oyler.

At the May term, 1872, of the Cass Circuit Court, Brent brought the present suit against Oyler and the other appellees to redeem.

The complaint only seeks to redeem from the sale on the decree of foreclosure in favor of Mrs. Smith against Ritter. There was no attempt to redeem the mortgage which appellant gave Ritter for the purchase-money, and which was held and owned by appellee Oyler.

The second paragraph of the answer of appellee Oyler set up the judgment in the case of *Hamilton and Oyler v. Brent* as an estoppel against appellant's right to redeem. To this para-

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graph a demurrer was overruled, and appellant excepted, and he refusing to answer further, final judgment was rendered against him.

Brent, not having been made a party to the action by Mrs. Smith against Ritter to foreclose the first mortgage, was not bound by the judgment, and had the right to redeem the land from such sale. But he failed to exercise such right, and when Hamilton and Oyler sought to foreclose the mortgage which he had given Ritter for the purchase-money, he defeated a recovery upon the notes and a foreclosure of the mortgage, by alleging and proving that the consideration of the notes had failed. When he relied upon the foreclosure and sale under the first mortgage and his subsequent ouster, he abandoned his right to redeem the land from such sale. To permit him now to redeem from such sale would work manifest and gross injustice ; for he would thereby acquire a title to the land by the payment of the small sum due on the first mortgage, and would hold the land free from the second mortgage, for he has the judgment of the court in his favor, which would prevent a recovery upon the notes and mortgage given by him to Ritter for the purchase-money. The law will not lend its aid to the consummation of such a monstrous fraud. The appellant is, upon every principle of justice and equity, estopped from redeeming under the first mortgage. The question is not before us, and we do not decide, whether he might redeem by paying the amount secured by both mortgages.

In our opinion, the second paragraph of the answer of appellee Oyler constituted a complete bar to the action, and the court committed no error in overruling the demurrer thereto.

The judgment is affirmed, with costs.

The State, *ex rel.* Wildman, Auditor, *v.* The Comm'rs of Vanderburgh Co.

THE STATE, EX REL. WILDMAN, AUDITOR OF STATE, *v.* THE
BOARD OF COMMISSIONERS OF VANDERBURGH COUNTY.

JURISDICTION.—*Superior Court.*—*Statute Construed.*—The Superior Court of Marion county has no jurisdiction of a suit by the State of Indiana, on the relation of the Auditor of State, against the board of commissioners of Vanderburgh county for uncollected state taxes, under section 269 of the act of December 21st, 1872, Acts 1872, p. 57.

SAME.—The words, "in any court of this State," as used in said statute, mean in any court of this State having competent jurisdiction.

From the Marion Superior Court.

J. C. Denny, Attorney General, for appellant.

C. Baker, O. B. Hord, A. W. Hendricks, and *B. Hynes*, for appellee.

WORDEN, J.—This was an action brought in the superior court of Marion county, to recover from the county of Vanderburgh the amount due the State for taxes imposed by law, and which should have been, but were not, collected. In the complaint, it is averred that in the year 1869, the board of equalization of Vanderburgh county fixed the value of the real estate in that county at fifteen million four hundred and ninety-four thousand seven hundred and fifty-five dollars, and that no other legal and valid appraisement of said property was made; that in the years 1869, 1870, 1871, and 1872, deductions were illegally made of six million five hundred and sixty-one thousand four hundred and sixty dollars each year from the appraised value by the auditor of said county, without authority, and that thereby forty-two and thirty-five one-hundredths per cent. was deducted by said auditor from the value of said real estate as fixed by said board of equalization; that for the year 1869, the value of the real property of said county, as fixed by the board for equalizing the real property of said county, was fifteen million four hundred and ninety-four thousand seven hundred and fifty-five dollars, and that the total amount placed upon the tax duplicate by the auditor of said county for said year was eight million nine

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hundred and thirty-three thousand two hundred and ninety-five dollars; that for the years 1869 and 1870 the tax for state purposes was fifteen cents on each one hundred dollars' worth of property, and the sinking fund tax required by law to be collected was ten cents on each one hundred dollars' worth of property, and sixteen cents on each one hundred dollars' worth of property for school purposes; that for the years 1871 and 1872, the state tax was five cents and school tax sixteen cents on each one hundred dollars; that the total amount due for state, school, and sinking fund tax, for the years 1869, 1870, 1871, and 1872, is ninety thousand dollars.

There was judgment for the defendant on a demurrer assigning for cause, that the court had no jurisdiction of the defendant. This judgment was affirmed at general term.

The only question raised here is that of jurisdiction.

The action was brought under the following statutory provision, in Acts of 1872, pp. 57, 122, on the subject of the assessment and collection of taxes:

"Sec. 269. Whenever it shall come to the knowledge of the Auditor of State that any county, township, city or town, or any well-defined locality thereof, or any particular class of property therein, has heretofore been or may hereafter be released, from any cause whatever, from its just and lawful proportion of state taxes, said auditor shall cause suit to be commenced in an action of debt, in the name of the State of Indiana, either against the municipality or against the property unjustly released from taxation, or the owners thereof, for the amount of such tax, in any court of this State, and when judgment may be recovered in any such cause the auditor shall levy a rate of tax on the equalized valuation of all property or particular class of property in such county, township, city, town or locality, as the case may be, as will pay the State the amount of such judgment and costs; and it shall be the duty of the county auditor of the proper county to extend such rates of tax with the state tax of the year directed in the auditor's certificate. Any county auditor neglecting or refus-

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ing to extend such rate, as certified to him by the Auditor of State, shall be removed from his office, and in addition thereto shall be subject to a fine of five thousand dollars, and damages caused by such neglect or refusal, to be sued by the Auditor of State, in an action of debt, in the name of the State of Indiana, in any court of this State: Provided, that in cases where the auditor and proper local authorities of the proper municipality can arrange to make such levy to reimburse the State in such cases, without suit, the Auditor of State is hereby authorized to pursue such course."

The question arises whether, under the statute, Vanderburgh county can be sued in the Marion Superior Court.

By the general law, the suit could have been brought in Vanderburgh county only. 2 G. & H. 56, Art. 3.

By the sections of the statute above set out, the action therein provided for may be brought "in any court of this State." If this language is to receive a literal interpretation, it will lead to results that we think were not contemplated by the legislature. Not only may a county be sued in any other county, but so may a city or town be sued in any other county, if an action can be brought at all against a city or town as provided for in the section. Not only so, but an action may be brought against the property unjustly released from taxation, or the owner thereof, in any other county than that in which the property is situate, or in which the owner resides, at the option of the Auditor of State. Not this alone, but the Auditor of State may proceed in any county of the State that he may choose, to collect the five-thousand-dollar fine from the county auditor for failing to discharge the duty imposed upon him by the section.

This much in reference to locality. The phrase, "any court of this State," is comprehensive. It includes courts of justices of the peace, for they are courts of record. *Hooker v. The State*, 7 Blackf. 272. It includes courts of county commissioners, for they also are courts of record. *The State v. Conner*, 5 Blackf. 325. It included the court of common pleas, then in existence, the circuit courts, criminal courts, superior courts

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and Supreme Court of the State. It is quite clear that the legislature never intended that such actions should be brought in the criminal courts or the Supreme Court. Yet the language employed in the statute is broad enough to include them. It is quite as clear that it was not intended that an action might be brought before the board of commissioners, or a justice of the peace, of one county, to recover the penalty and damages provided for from the auditor of another county. Yet the literal terms of the statute would authorize such action.

We do not think the legislature intended any such results, or to work so wide a departure from the general judicial system of the State. We must therefore seek some other than a literal interpretation of the language employed. And we think the legislature, by the phrase "in any court of this State," meant nothing more nor less than if they had said "in any court of this State having competent jurisdiction." This construction will harmonize with the general law of the State, and carry out what we are justified in concluding was the intention of the legislature.

Jurisdiction has reference to parties, as well as subject-matter, and, with the interpretation which we give the statute, the Marion Superior Court had no jurisdiction of the defendant.

The judgment below is affirmed, with costs.

SCHAFER ET AL. v. THE STATE, EX REL. COX.

LIQUOR LAW.—*Suit on Bond Given by Person Holding Permit to Sell Intoxicating Liquor.*—The damages which may be recovered in an action upon a bond executed in conformity to the third section of the act to regulate the sale of intoxicating liquors (Acts 1873, p. 151), must have been suffered by or inflicted upon some person by reason of the sale of intoxicat-

49	460
130	381

49	460
165	582

49	470
171	313

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ing liquor by the person receiving a permit under said act, his agent, or employes.

SAME.—*Pleading.*—The complaint in such case must aver that the injury complained of and the damages sought to be recovered resulted in consequence of a sale of intoxicating liquors.

SAME.—An averment in such complaint, that whilst A. was intoxicated, by reason of liquor sold him by the person holding the permit, he inflicted a mortal wound on the husband of the plaintiff, causing his death, does not sufficiently show that the mortal wound was inflicted by reason of the intoxication of A.

SAME.—A complaint in such case, which avers that the intoxication was caused in part by liquor sold by the holder of a permit, and that while the purchaser was so intoxicated, and by reason of such intoxication, he inflicted the mortal wound, etc., is bad.

PRACTICE.—*Cause Tried on Complaint Containing both Good and Bad Paragraphs.*—Where a cause has been tried on issues joined upon a complaint containing two or more paragraphs, some defective and others good, a demurrer to the former having been overruled, and the record not showing that the cause was tried and the judgment rendered exclusively upon the good paragraphs, the judgment will be reversed for error in overruling the demurrers to the defective paragraphs.

From the Posey Circuit Court.

E. M. Spencer, W. Loudon, J. H. Laird, and H. H. Pritchard,
for appellants.

A. P. Hovey and G. V. Menzies, for appellee.

BUSKIRK, J.—The only questions presented by the record in this cause relate to the sufficiency of the complaint. It consisted of ten paragraphs. Demurrers were overruled to each paragraph, but appellants have only assigned error upon the action of the court in overruling demurrers to the first, second, third, fourth, fifth, seventh, and ninth paragraphs. It is conceded that the sixth, eighth, and tenth paragraphs are good.

This action is based upon a bond executed by Henry Schafer as principal, with the other appellants as his sureties, and is in strict conformity to the requirements of the third section of the temperance act of February 27th, 1873, the condition of which bond is as follows:

“The condition of the above obligation is for the payment of any and all fines, penalties, and forfeitures incurred by reason of the violation of any of the provisions of the temper-

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ance act, entitled 'an act to regulate the sale of intoxicating liquors, to provide against evils resulting from any sale thereof, to furnish remedies for damages suffered by any person in consequence of such sale, prescribing penalties, to repeal all laws contravening the provisions of this act, and declaring an emergency,' approved February 27th, 1873; and conditioned further, that the principal and sureties herein named shall be jointly and severally liable, and shall pay to any person or persons any and all damages which shall in any manner be suffered by or inflicted upon any such person or persons, either in person or property, or means of support, by reason of any sale or sales of intoxicating liquors to any person by the said Henry Schafer or by any of his agents or employes."

The first paragraph of the complaint is as follows: "The State of Indiana, on relation of Mary Cox, an infant under the age of twenty-one years, by her next friend, William A. Barrett, whose written consent to sue is filed herewith, complains of Henry Schafer, and Gottfried Schafer, and John S. Wilsey, defendants, and says, that heretofore, to wit, on the 20th day of November, 1873, said defendants executed a bond to the State of Indiana, in the penal sum of three thousand dollars, conditioned that the defendant Henry Schafer should pay all fines, penalties, and forfeitures incurred by reason of the violation of any of the provisions of an act of the legislature entitled an act to regulate the sale of intoxicating liquors, etc., approved February 27th, 1873, and to 'pay to any person or persons any and all damages which shall in any manner be suffered by or inflicted upon any such person or persons, either in person or property, or means of support, by reason of the sale of intoxicating liquors;' a copy of which bond is filed herewith and made a part of this complaint; that afterward, to wit, on the — day of —, 1873, said defendant Henry Schafer obtained a permit to sell intoxicating liquors on the premises named in said bond, to wit, at subdivision S½ of lot 95, in Owen's part of New Harmony, in Posey county, State of Indiana, a copy of which is filed and made a part of this complaint; that afterward, to wit, on the — day of February, 1874,

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said defendant Henry Schafer did sell intoxicating liquor to one Stephen Harris, on the premises aforesaid, so as to cause the intoxication of said Harris ; that on the day last aforesaid, whilst said Harris was intoxicated, by reason of the liquor sold to him by said defendant Henry Schafer, as aforesaid, the said Harris inflicted with a knife a mortal wound upon the body of one Henry Cox, then and there being the husband of said plaintiff, which caused the death of said Henry Cox ; that by reason of said sale of intoxicating liquor to said Harris and the death of said Henry Cox, the plaintiff is damaged, in her means of support, in the sum of three thousand dollars ; wherefore she demands judgment for three thousand dollars, and for full relief."

We set out so much of each paragraph as will present the point made :

"Par. 2. Said Henry Schafer sold intoxicating liquor to one Henry Cox, the husband of the plaintiff, on said premises, so as to cause the intoxication of said Henry Cox ; that on the day last aforesaid, said Cox, whilst intoxicated as aforesaid, engaged in an affray with one Stephen Harris, and in said affray received a mortal wound inflicted by said Harris, which caused the death of said Cox ; that by reason of said sale of intoxicating liquors to said Cox and the death of said Cox, the plaintiff has been damaged in her means of support," etc.

"Par. 3. That said Henry Schafer gave intoxicating liquors to one Stephen Harris, causing the intoxication of said Harris ; that on the day last aforesaid, said Harris, whilst intoxicated, by reason of the intoxicating liquor given to him as aforesaid, inflicted a mortal wound upon the body of Henry Cox, the husband of the plaintiff, which caused the death of the said Henry Cox ; that by reason of giving the said liquors as aforesaid and the death of the said Henry Cox, the plaintiff has been damaged in her means of support," etc.

Par. 4. Same as third, except giving the liquor to said Henry Cox instead of Harris, with like averment of the consequences as stated in second count.

"Par. 5. That George Dietz, then and there being in the

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employ of the said Henry Schafer, sold intoxicating liquors to one Stephen Harris, on said premises, which caused the intoxication of said Harris; that on the day last aforesaid, said Harris, whilst intoxicated from the liquor sold to him by said Dietz as aforesaid, inflicted a mortal wound upon the body of one Henry Cox, said Cox being then and there the husband of the plaintiff, which caused the death of said Cox; that by reason of said intoxication of the said Harris and the death of said Cox, the plaintiff has been damaged in her means of support," etc.

Par. 7. Sale to Harris by Schafer, which in part caused the intoxication of said Harris, who, being intoxicated as aforesaid and by reason of said intoxication did inflict a mortal wound upon the body of one Henry Cox; said Cox being then and there the husband of the plaintiff, which caused the death of the said Cox; that by reason of the intoxication of the said Harris as aforesaid and the death of said Cox, the plaintiff is damaged in her means of support, etc.

Par. 9. That Dietz, employee of Schafer, "sold to Stephen Harris intoxicating liquor, which in part caused the intoxication of the said Harris, on the day last aforesaid; said Harris, being intoxicated as aforesaid, did inflict a mortal wound upon the body of one Henry Cox, which caused the death of said Cox, said Cox being then and there the husband of the plaintiff; that by reason of the intoxication of the said Harris as aforesaid and the death of said Cox, plaintiff is damaged in her means of support," etc.

The bond required by such section is conditioned, first, for the payment of any and all fines, penalties, and forfeitures incurred by reason of the violation of any of the provisions of said act. There is no assignment of any breach of this portion of the bond in the present suit. The present action is based upon the following portion of said section:

"And conditioned further, that the principal and sureties therein named shall be jointly and severally liable, and shall pay to any person or persons any and all damages which shall in any manner be suffered by or inflicted upon any such person

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or persons, either in person or property, or means of support, by reason of any sale or sales of intoxicating liquors to any person, by the person receiving such permit or by any of his agents or employes."

The damages which may be recovered, in an action upon a bond executed under and in conformity to the above quoted language, must have been suffered by or inflicted upon some person by reason of the sale of intoxicating liquors by the person receiving a permit under said act or by his agents or employes. And to render a complaint good, it should be averred that the damages sought to be recovered resulted in consequence of or by reason of a sale of intoxicating liquors.

The first, second, and fifth paragraphs of the complaint are bad, for the reason that it is not alleged in either of said paragraphs, that the death of Henry Cox was caused by or resulted from the sale of intoxicating liquors. It is alleged in the first that whilst said Harris was intoxicated, by reason of the liquor sold to him by said defendant Henry Schafer as aforesaid, the said Harris inflicted with a knife a mortal wound upon the body of one Henry Cox, then and there being the husband of said plaintiff, which caused the death of said Henry Cox; that by reason of said sale of intoxicating liquors to said Harris and the death of said Henry Cox, the plaintiff is damaged in her means of support, etc.

It will be observed that the allegation is, that whilst Harris was intoxicated he inflicted the mortal wound, but it is not averred that the mortal wound was inflicted by reason of or in consequence of such intoxication. Although Harris was intoxicated, he may have been assaulted by Cox in such a manner as to render the killing excusable or justifiable. It is alleged that by reason of said sale of intoxicating liquor to said Harris and the death of said Cox, the plaintiff is damaged. This conclusion does not necessarily result from the premises stated. Such would have been the logical deduction, if it had been averred that the wound was inflicted by reason of or in consequence of the sale of such intoxicating liquor,

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but such would not be the proper deduction, if the wound was inflicted from some other and different cause than such intoxication.

The second is the same as the first, except it is alleged that the intoxicating liquor was sold to Henry Cox.

The fifth is the same as the first, except that it is alleged that the intoxicating liquor was sold by an employe of the person who had received the permit.

The third paragraph alleges that the intoxicating liquor was given to Harris, and the fourth alleges a gift of intoxicating liquor to Cox. Both of these paragraphs are clearly and plainly bad. The condition of the bond is to pay such damages as are suffered or inflicted by reason of the sale or sales of intoxicating liquors. The twelfth section of said act creates a personal liability against the person receiving a permit, for damages resulting from selling, bartering, or giving away intoxicating liquors. A construction was placed upon the twelfth section in the recent case of *Fountain v. Draper*, *ante*, p. 441, where it was held that the holder of the permit was personally liable for the damages resulting from selling, bartering, or giving away intoxicating liquors.

The ninth is subject to the same objection as the first, second, and fifth.

The seventh is free from the objection which we have been considering. That alleges a sale to Harris which caused his intoxication, who, being intoxicated and by reason of said intoxication, did inflict a mortal wound upon the body of Henry Cox, etc.

It is very earnestly contended, that the seventh and ninth paragraphs of the complaint are bad, because it is averred that the intoxication of Harris was caused in part by the liquor sold by the holder of the permit or his agent. It is provided, by the twelfth section of said act, that the holder of a permit shall be personally liable for damages caused by intoxication which was produced, in whole or in part, by the liquor sold by such person. *Fountain v. Draper*, *supra*.

There is no such provision in the third section. The prin-

principal and his sureties in the bond in suit are liable for any and all damages which shall in any manner be suffered by or inflicted upon any such person as is entitled by said act to sue, either in person or property, or means of support, by reason of any sale or sales of intoxicating liquors to any person. If the death of Cox was caused by reason of the sale of intoxicating liquors by the principal in the bond, then he and his sureties are answerable for all the damages resulting therefrom.

The seventh and ninth paragraphs do not, nor does either of them, allege that the death of Cox was caused by a sale or sales of liquor by the principal in the bond. The damage must result from the sale or sales of liquor, whether it shall make the party using it partially or wholly intoxicated. In this, the language of the third section and the terms of the bond are essentially different from the language of the twelfth section.

The third section gives an action on the bond for any damages which result "by reason of any sale or sales," while in the twelfth section the action is against the vendor for injuries in person or property, or means of support, caused "by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person," and the vendor who causes the intoxication, "in whole or in part," is made liable.

We think it is quite clear, that an allegation that a sale of liquor, in part, caused the intoxication of Harris, and that while he was intoxicated he committed the act, is not the equivalent of a statement that the damage resulted from a sale or sales of liquor made by the principal in the bond. A sale or sales of liquor may contribute to the intoxication of a person who, while intoxicated or in consequence of the intoxication, may perpetrate or cause damage, and yet the damage not be caused by the sale or sales so made, but by and in consequence of other and different sales. Nothing short of an allegation and corresponding proof that the damage resulted by reason of the sale or sales made by the principal in the bond, or his agents or employes, will make out a cause of

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action on the bond, under the third section. If it shall be found difficult, in practice, to trace and show the connection between the sale or sales and the resulting damage, it grows, as a necessary and unavoidable consequence, out of the proper construction of the language used by the legislature in giving the right of action.

The seventh and ninth paragraphs are bad, for the reasons stated.

It is, however, strenuously contended by counsel for appellee, that we should not reverse the judgment, if the court erred in overruling demurrers to bad paragraphs of the complaint. It is argued that one good paragraph of the complaint is sufficient to sustain the finding and judgment of the court below; and we are referred to several cases prior to the code and one or two since, but these cases have been overruled in principle by repeated decisions of this court.

It is the settled rule of practice of this court, that where a cause has been tried on issues joined upon a complaint containing two or more paragraphs, some defective and others good, a demurrer to the former having been overruled, the record not showing that the cause was tried and the judgment rendered exclusively upon the good paragraphs, the judgment will be reversed for error in overruling the demurrers to the defective paragraphs. To sustain a judgment in such a case, the record must affirmatively show that the finding and judgment proceeded wholly upon the good paragraphs. *Blasingame v. Blasingame*, 24 Ind. 86; *Wolf v. Schofield*, 38 Ind. 175; *Peery v. The Greensburgh, etc., Turnpike Co.*, 43 Ind. 321; *Keesling v. McCall*, 36 Ind. 321; *Bailey v. Trozell*, 43 Ind. 432; *Hawley v. Smith*, 45 Ind. 183.

The rule is otherwise, where a demurrer is improperly sustained to a good paragraph, if the same facts are admissible under some other paragraph. In such case the erroneous ruling will not injure the party; but where a demurrer is overruled to a bad paragraph, the party is injured, because less evidence would be required under a bad than a good paragraph.

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The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the demurrer to the first, second, third, fourth, fifth, seventh, and ninth paragraphs of the complaint.

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PRINCIPAL AND SURETY.—*Fairness to Surety.*—*Duty of Surety.*—As a rule of law, strict integrity and complete fairness are due from the creditors of a debtor to one who is about to become surety for such debtor; but this rule will not excuse the person about to become surety from reasonable attention to the circumstances under which he is called upon and reasonable diligence to inform himself as to the prudence of the act he is about to do.

SAME.—If a person who is asked to become surety for another is put upon his guard by the circumstances surrounding the party for whom he is asked to become surety, and can ascertain from the persons present all the facts necessary to shield himself from fraud, he should make the inquiry.

SAME.—Fraud must not be induced by the person who complains of it, nor must he suffer himself to become an indolent victim.

SAME.—*Right of Surety to Rescind for Fraud.*—If a person is induced by fraud to become the surety of a debtor, and by the act he takes the property of the debtor from the reach of his creditors by ordinary process of law, he must, upon the discovery of the fraud, at once rescind, if he would relieve himself.

PAYMENT.—*Voluntary Payment.*—Money voluntarily paid, with a full knowledge of the facts, cannot be recovered back.

From the Clinton Circuit Court.

J. W. Nichol, L. Jordan, L. McClurg, and J. E. McDonald,
for appellants.

T. A. Hendricks, O. B. Hord, A. W. Hendricks, and A. J. Boone, for appellee.

BIDDLE, J.—Complaint by the appellants against William Shannon, Elisha D. Shannon, and the appellee, on the following bond:

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“ This agreement, made and entered into by and between William Shannon, Elisha D. Shannon, and Andrew J. Boone, of the one part, and Stedman & Shaw, Murphy, Kennedy & Co., Webb, Tarkington & Co., Evans, Dawes & Co., Pearce, Tolle & Halton, C. E. Hawthorne, Talbott & Son, and E. G. Leonard, of the second part, witnesseth, that, whereas the said William Shannon is indebted to the said several parties of the second part as follows :” setting forth the debts, amounting to five thousand and seventy-six dollars and eight cents. “ And to secure the payment of the said several sums of money and accruing interest to the said parties of the second part, the said Shannon has this day transferred to James N. Binford, of Thorntown, Boone county, Indiana, as trustee, certain property described in a schedule marked ‘A,’ to be by him reduced to money and applied to the payment of said claims *pro rata*, as the avails of said property shall come into his hands. Now, therefore, if the said Binford from the said property shall pay the said claims and all accruing interest in full within eighteen months from this date, then the parties of the first part shall be fully discharged from this obligation ; but, in case the said Binford shall fail, from the proceeds of said property, to pay the said claims as aforesaid, in manner aforesaid, then, in consideration of the premises, the said parties of the first part bind themselves to pay the parties of the second part any deficiency. Any surplus that may remain in the hands of said Binford, after the payment in full of the parties of the second part, as aforesaid, and all expenses of reducing said property to money and paying over the same, shall be returned to said Shannon.

“ In witness whereof,” etc.

This bond is dated the 27th of September, 1865, and signed by the two Shannons, the appellee, and the appellants.

Neither of the Shannons was served with process, nor did either of them appear. Boone answered :

1. That he believed William Shannon to be an honest and trustworthy man, possessing ample means to pay his debts ; that, as an inducement to him to execute said bond, the appel-

lants represented to him that the assets set out in said schedule were of great value, to wit, seven thousand seven hundred and ninety dollars and twenty-three cents, and procured said Shannon to assent to said statement; that reposing implicit confidence in the truth of these representations, and in the solvency of William Shannon, and being wholly ignorant of the facts hereinafter stated, he executed the bond; that said Shannon was about to remove out of the State, taking with him property subject to execution; that the plaintiffs instituted proceedings in the court of common pleas of said county, and had the said William Shannon and Elisha D. Shannon arrested; that orders of arrest were procured on affidavit; that the Shannons were under arrest and in the custody of the sheriff at the time said appellee signed the said bond; that at the time he did so execute said bond, the property specified in said schedule was only of the value of twelve hundred dollars; that all of said facts were known to appellants and unknown to the appellee, which knowledge they withheld from him for the fraudulent purpose of inducing said appellee to execute said bond; all of which is formally alleged, with time and dates, and with exhibits filed.

2. The second paragraph of answer is similar to the first, with the additional averments, that Binford, the trustee named in the bond, had entered upon his trust and reduced certain of the assets—setting them forth—to money, amounting to one thousand and forty-five dollars and thirty-six cents, which was all that Binford could collect from the personal property; that, in pursuance of an agreement, Binford, on the 20th day of September, received conveyances for the real estate mentioned in the trust, for the purposes specified in the bond; that on the 10th of March, 1871, he received information of William Shannon's insolvency, and Binford then conveyed the said lands and the residue of said property in trust, consisting of small accounts, to appellee, who was to make such disposition of said personal property and lands as should seem best; that on the 21st of May, 1867, appellee procured a deed of conveyance from William Shannon of one hundred

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and sixty acres of land in Ringgold county, Iowa—describing the same—in trust for said creditors; that the title to said lands was encumbered, defective, and worthless; that said appellee had received in money from said assigned property one hundred and fifty dollars and fifty-nine cents, and paid to the creditors, stating the particulars, in all amounting to two thousand one hundred and fifteen dollars and sixty cents, expending for services and expenses two hundred dollars; that all this was without any knowledge of the fraud, crime, and deceit of the plaintiffs as alleged, until about March 5th, 1869; then there is an offer to reconvey the lands, and a prayer for relief, all of which is formally stated, with dates, exhibits, etc.

3. The third answer was payment.

Demurrers were filed, and properly overruled, to the first and second paragraphs of answer.

Replies were filed to the first and second paragraphs, and issue joined.

Trial by jury. General verdict for the appellee against the appellants; against George T. Stedman and Thomas F. Shaw, for one thousand and sixty-eight dollars and thirty-two cents; against John W. Murphy, B. Frank Kennedy, Wiley W. Johnson, and William Holliday, for four hundred and twenty-five dollars and seventy cents; against Willis S. Webb, William C. Tarkington, and Frank Landers, for four hundred and twenty-one dollars and thirty-three cents; against William N. Evans, Adelbert C. Dawes, John Picken, Nathan T. Parker, and Ellison C. Hill, for sixty dollars and fifty-seven cents; against John M. Talbott and Charles M. Talbott, for forty-five dollars and twenty-five cents.

There was no finding by the jury in reference to the lands offered to be reconveyed by the third paragraph.

Motion for a new trial overruled. Judgment against the appellants in favor of the appellee for the several amounts as found by the verdict, and for the reconveyance of the lands to a trustee for the benefit of the creditors. Appeal to this court.

The evidence is all before us, in a bill of exceptions, and the third error assigned is, that it is insufficient to sustain the verdict.

Andrew J. Boone, the appellee, testifies: "When I came to town on the morning of the 27th of September, 1865, after leaving my horse at the livery stable, I went immediately to the court-house, and, as the court had commenced, went at once to business in the court; in a short time some one came to me, I cannot say whether it was the sheriff or a bailiff of the court, and informed me that some gentleman desired to see me in the room in the south-east corner of the court-house, up stairs; think it was used by some one as a law office at the time; asked the messenger what was wanted; he said there were some men there who wanted to see me on business; in a short time I went to the room, and found Joseph E. McDonald, who was sitting there at a table writing, Frank Landers, who was standing, William Shannon, Elisha D. Shannon, John Kenworthy, sheriff, and a man whom I have known as Thomas F. Shaw, who was also standing in the room, and it is possible there were some others, but I do not recollect them; I inquired what was wanted with me; Mr. Shaw replied, that I had been called to go security for William Shannon, who was indebted to various persons, amounting to some five thousand dollars, a statement of which was made, and that certain personal and real property was to be turned over to James N. Binford, as trustee, to be by him converted into money and applied on the indebtedness, *pro rata*, from time to time, as set forth in the agreement; Mr. Shaw held up to me a statement of the property to be thus assigned to Binford, on a paper of which schedule 'A,' referred to in the written bond, is a copy, giving the amounts and kinds of property, as follows:" (giving the contents of the schedule attached to the bond); "that if the money could not be made out of these assets in eighteen months, the bond was to secure the deficiency; I then said that I had retired from business, and did not wish to become responsible for so large a sum of money, but if the property was of the value stated, I had no objections to

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the use of my name, for the purpose of allowing the reduction of the assets to money, but did not wish to become reponsible for the payment of money ; that I knew nothing of the value of the property, but supposed it was all correct. Shaw responded, that it was so represented to him, and the Shannons nodded assent ; I cannot state whether this was all said when I first came into the room, or whether a part then and part when I came a second time to sign the bond ; Mr. McDonald then had a draft of the bond completed, or about so, and read it over to me ; there was so much scratching and interlineation that it was decided the original draft should be copied, which Mr. Shaw proposed to do, and did do ; he wrote two or three copies, two at least of which I signed ; while the copies were being made I returned to the court room to business again, and was called again to sign the bond ; think all the parties except myself remained in the room ; Mr. Shaw represented all the creditors except Webb, Tarkington & Co.; I then returned to business."

In a letter addressed to Stedman & Shaw, Cincinnati, Ohio, dated March 11th, 1867, Mr. Boone writes :

"I called upon Mr. Binford at Thorntown, and with him made an examination of the Shannon assets, of the notes and accounts, and find uncollected - - - \$642.46
Collected and applied on your claims, taxes, and
expenses - - - - - 846.12

Total of notes and accounts - - - \$1,488.58
The uncollected are perfectly worthless for the purpose of raising money. * * *

"The farm in Iowa the Shannons have sold, and after paying off the mortgage of thirteen hundred dollars, have used the residue of the money. This farm they represented as worth three thousand dollars, and free at the time I signed the bond, and promised then to make to me a mortgage on it to secure me against contingencies. Their representations to me were, at the signing of the bond, that the assigned property

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was worth seven or eight thousand dollars ; that it would make money enough and more than to pay creditors.” * *

“ Thus you see, I am victimized. I have some money which I intend to apply to the claims of the Shannon creditors *pro rata*, and have property and claims, but have not money enough to pay the creditors off, and cannot convert my property to money without ruinous sacrifices to me. * *

“ I have no acquaintance with you, but from your business and position I am warranted in presuming you a gentleman. My folly in becoming surety should not be a pretext for a severer punishment than the payment of the debt on the easiest terms. If I had received your goods or your money to the amount of your claims, I would not complain of the last dollar and the last cent ; nor do I complain of any act of yours now ; but it will be easier for me to pay without costs than with them, so that I have recourse upon the Shannons. *

* If you allow commissions, allow them to me. I am more interested in making your claim for you than any one I know of. * *

“ I desire to meet as many of the creditors as I can at Indianapolis, on Tuesday, 19th inst. next, at 10 o'clock A. M., at the office of McDonald & Roach, or at any other convenient place. I will have a little money to distribute among them, and want to make some arrangements for an attack upon my principals.”

In a letter from Boone to the same parties, dated March 21st, 1867, he says :

“ I purchased the Shannon assets yesterday for six hundred dollars, and regard it as an exceedingly poor investment at that. Mr. Binford makes the entire receipts on assets to the 20th inst. - - - - - \$1,016.92
And sales of lands on 20th and accounts - - - 600.00
\$1,616.92”

Joseph E. McDonald testified as follows :
“ On the morning of the day the bond was given, I was spoken to by Mr. Landers to assist Col. Hamilton and

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Galvin in the settlement. Shaw also spoke to me. I learned the Shannons had been arrested on *capias*, but I gave no attention to that part of the business. Binford was acting as attorney for the Shannons. Binford told me he would ask the creditors for a settlement. That was the first I knew of the offering of the assets. My best recollection is, that shortly after the court convened in the afternoon, the Shannons were proposing to make another offer. I was called into the room where the business was transacted ; I went in there, and found Mr. Shannon and his son ; and Mr. Binford, Mr. Shaw, and Mr. Landers were there, and probably went there with me. In the conversation, the Shannons thought it was hard that the creditors refused the assets. They then talked of time. Mr. Shaw carried on the conversation, and said they could have any reasonable time, and if the claims were made out of the assets, well and good, but if not, the balance must be secured ; the Shannons could appoint their own attorney to attend to the business, but the deficiency must be secured. The creditors said they could have time, if it was proposed to turn the assets into money, but there must be security. The Shannons finally agreed to make the offer of surety, and one or the other of the Shannons suggested Boone. Shaw and Landers asked about Boone's condition. I said it was good ; that he was responsible. Mr. Boone had not been before named. Shaw and Landers, acting for the creditors, agreed to give eighteen months to turn the assets into money, and consented to have Binford appointed as trustee for that purpose, and agreed to receive Boone as surety. The Shannons, Shaw, Landers, and the sheriff were present. The sheriff or his deputy went for Mr. Boone ; when Mr. Boone came in, my recollection is, I stated the proposed negotiation. The proposal was to make Mr. Binford trustee and turn the assets into money, and for Boone to become surety for the deficiency after the assets were exhausted, if there was any deficiency. I don't remember to have seen the schedule ; it was referred to, but I don't remember of seeing it. The statement was, that the creditors were willing to give time, and allow the Shannons to make Binford trustee ;

they simply wanted surety ; if the money could not be made out of the assets, it was to be made out of the surety. I did not draw up the bond till Mr. Boone had consented to become surety. Boone went out, and I had almost finished the bond when Mr. Boone was called in. There were several interlinations in the draft I made, and I proposed to Mr. Shaw to make a copy. I dictated to him while he wrote ; when he had finished the copy, I tore up the original draft. The schedule was referred to, and the fact was stated that the Shannons proposed to turn over the assets to Binford as trustee. I heard neither Shaw nor Landers make any representations as to the value of the assets ; the creditors did not want the assets, and said so ; they were unwilling to settle in that way, unless they were made secure. Boone's name was suggested by one of the Shannons ; I think they had Boone sent for by the sheriff."

Thomas F. Shaw, as to the time and place where the bond was executed, testified as follows :

" I saw the schedule in the room ; I made no representations to any one about the value of the assets ; I made no representations to any one. * * I had some talk with Mr. Boone at the time the creditors met, March 19th, 1867, at Murphy & Johnson's store, about the surety, and he then made no complaint about the creditors ; he was mad at the Shannons, but not at the creditors."

On cross-examination, Shaw states : " I made no representations as to the value of the securities, for I knew nothing about their value."

B. Franklin Landers testified : " The next day the parties were under arrest nearly all day, and wandered about town most of the time ; toward noon a settlement was proposed ; time was asked for, and surety was to be given ; the name of Boone was suggested by either one or the other of the Shannons. * * * I never made any representations, at the time the bond was executed, about the solvency of the Shannons or the value of the assets ; I believed them to be good, and believed that when they were brought up to the jail door they would shell out ; the fact of their arrest was notorious, and

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I supposed that Boone knew it as did every one else ; there was no concealment of the arrest ; they were around town and in custody of the sheriff, and I supposed that that fact was known to Boone."

This is all the essential evidence touching the fraud set up in the first and second paragraphs of the answer, which, it is averred, consisted in the fraudulent representations of the appellants to the appellee, concerning the value of the assets in schedule " A " accompanying the bond, and the fraudulent suppression of the fact that the Shannons had been and were under arrest at the time the bond was executed by the appellee.

There is no evidence in the record showing that any of the appellants made any representations to Boone as to the value of the assets mentioned in the schedule at any time. Boone testifies that just before and about the time he signed the bond, in talking of the value of assets named in the schedule, he Boone said he "supposed it was all correct," to which Shaw responded, that "it was so represented to him (Shaw), and the Shannons nodded assent." But there is no evidence whatever that the assent of the Shannons was thus obtained by collusion with Shaw. Shaw testifies that he made no representations whatever to Boone or any one else about the value of the assets, and that he had no knowledge of their value. McDonald, who was present during all the time of the transaction, testifies that he "heard neither Shaw nor Landers make any representations as to the value of the assets."

The fraud alleged to have been committed at the time the bond was executed is thus left to rest solely upon the fraudulent suppression of the fact that the Shannons were at the time under arrest. Shaw testifies that he said nothing about the arrest at the time, because he supposed Boone knew it. Landers testifies, that "the fact of their (the Shannons') arrest was notorious, and he supposed that Boone knew it, as did every one else. There was no concealment of the arrest. They were around town and in custody of the sheriff, and I supposed that that fact was known to Boone."

Boone testifies, that at the time he executed the bond, he knew nothing of the arrest.

There was much in the circumstances, however, to inform Boone that there was something peculiar in the transaction. The place where it transpired was unusual for such business; the sheriff or his bailiff came for him; he saw the Shannons with the sheriff in the room; their creditors were there, pressing them for some arrangement of their debts; they wanted them to take the assets; the schedule was presented; they would not take them, but insisted upon security; he was applied to to sign their bond. All of these facts are out of the usual way in which merchants settle with their creditors, and should have put Boone on his guard against hastily signing the bond without inquiry or consideration. While strict integrity and complete fairness were, as a rule of law, due from the creditors of Shannon to Boone when he was about to become their surety, yet this did not excuse Boone from reasonable attention to the circumstances and reasonable diligence to inform himself as to the prudence of the act he was about to do. He could have ascertained from the persons in the room all the facts necessary to shield himself from fraud, and, having been put upon his guard by the circumstances, he should have made the inquiry.

Fraud must not be induced by the person who complains of it, nor must he suffer himself to become an indolent victim. Fraud is never presumed. It must be proved by the party who alleges it.

And if fraud was practised upon Boone in obtaining the execution of the bond, as is alleged, it was his duty at once, upon its discovery, to rescind the obligation. His act took the property of William Shannon away from the reach of his creditors by the ordinary process of law, and he cannot, with a full knowledge of the facts, keep it in that condition, though there might have been fraud in procuring the execution of the bond. There is not in the whole range of the evidence, from the execution of the bond to the commencement of the suit upon it, any complaint shown to have been made by Boone against the

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creditors of William Shannon. On the contrary, in his letter to Stedman & Shaw, of March 11th, 1867, nearly a year and a half after the execution of the bond, and after he knew all about the deficiency in the assets, and long after he must have known of the arrest of the Shannons, of which he complains, he speaks of his own "folly in becoming surety," and says, "nor do I complain of any act of yours now;" seeks an interview with the creditors of Shannon, saying, "I will have a little money to distribute among them, and want to make some arrangements for an attack upon my principals." His letter to the same parties, dated March 21st, 1867, giving a statement of the condition of the assets, is of similar purport. After treating the bond as obligatory from the time it was executed to the commencement of the suit upon it, a period of over three years, thus during all this time keeping the property of William Shannon away from execution by his creditors, and with a full knowledge of all the facts of which he now complains for at least two years, in our opinion it was too late to avail himself of any fraud in obtaining the bond, even though such fraud had been clearly proved. The authorities are clear upon this point. In 2 Parsons Con. 780, 781, the author says:

"The defrauded party does not lose his right to rescind because the contract has been partly executed, and the parties cannot be fully restored to their former position; but he must rescind as soon as circumstances permit, and must not go on with the contract after the discovery of the fraud, so as to increase the injury necessarily caused to the fraudulent party by the rescission. In other words, if he rescinds on the ground of fraud, he must do so at once on discovering the fraud; for he is not bound to rescind, and any delay, especially if it be injurious to the other party, would be regarded as a waiver of his right.

"The mere lapse of time, if it be considerable, goes far to establish a waiver of this right; and if it be connected with an obvious ability on the part of the defrauded person to discover

the fraud at a much earlier period, by the exercise of ordinary care and intelligence, it would be almost conclusive."

In Leake *Law of Contracts*, a late English work, p. 193, the author on this point lays down the rule as follows:

"Where an agreement has been induced by the fraud of one of the parties upon the other, the party defrauded has the right of avoiding the agreement upon the discovery of the fraud; but, subject to the exercise of such right, the agreement is binding. * * If a party who has been induced to enter into an agreement by the fraud of the other party, after discovering the fraud, treats the agreement as binding, he loses his right of avoiding it."

The court in *Masson v. Bovet*, 1 Denio, 69, hold the following language:

"But if the party defrauded would disaffirm the contract, he must do so at the earliest practicable moment after discovery of the cheat. That is the time to make his election, and it must be done promptly and unreservedly. He must not hesitate; nor can he be allowed to deal with the subject-matter of the contract and afterwards rescind it."

In *Sieveling v. Litzler*, 31 Ind. 13, this court declared that "one of the most clearly established rules in this class of cases is, that the party claiming to rescind on account of fraud must act at once on discovery of the fraud; and he cannot postpone discovery by neglect to use ordinary diligence."

We shall not depart from this well settled rule. See, also, *Shaw v. Barnhart*, 17 Ind. 183, and *Shepherd v. Fisher*, 17 Ind. 229.

The evidence shows us that the ground of the appellee's demand, set up in the third paragraph of his answer, is for money paid to the appellants under the obligations of the bond, and we are convinced that the payments were made by the appellee after he had become fully informed of all the facts touching the execution of the bond and the value of the assets described in the schedule; he cannot, therefore, recover back the money thus paid. Money voluntarily paid, with a full

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knowledge of the facts, cannot be recovered back. *Leake Law of Contracts*, 46, 56 ; *Woodburn's Adm'r v. Stout*, 28 Ind. 77 ; *Shirts v. Irons*, 28 Ind. 458 ; *Bevan v. Tomlinson*, 25 Ind. 253 ; *Brooks v. Berryhill*, 20 Ind. 97 ; *Jenks v. Lima Township*, 17 Ind. 326 ; *The Town of Ligonier v. Ackerman*, 46 Ind. 552.

We are of opinion that the evidence does not establish the fraud ; but whatever it may establish on that point, it proves without contradiction that Boone, with a full knowledge of all the facts, recognized the validity of the bond, and afterwards paid money under its terms ; he cannot, therefore, now avoid its obligation, much less recover back the money so paid.

The judgment is reversed, at the appellee's costs ; and the cause remanded for further proceedings not inconsistent with this opinion.

BUSKIRK, J.—I concur in so much of the opinion of the court as holds that the payments made by the appellee were voluntary, and cannot be recovered back, and from the remainder of the opinion I dissent.

49	482
136	73
49	482
143	622
49	482
146	340
49	482
152	556
49	482
163	648

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PRACTICE.—When a demurrer has been filed and overruled, and the record does not contain the demurrer, it will be presumed that it was overruled on account of its own defects, or that it presented some objections to the pleading to which it was not liable.

SAME.—*Pleading Struck Out.*—When a pleading is struck out, it can only be brought into the record again by a bill of exceptions.

WRITTEN INSTRUMENT.—*Construction of for the Court.*—It is the duty of the

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court to construe written instruments affecting the rights of parties, where there is no ambiguity, and an interrogatory submitting such question to the jury should not be propounded.

PRACTICE.—*Uncertainty of Special Finding.*—Where the special finding of a jury, on account of the language of an interrogatory and the answer thereto, is so uncertain that the meaning cannot be definitely ascertained, such special finding will not warrant the court in disregarding the general verdict, and rendering judgment on the special finding.

PLEADING.—*Correction of Written Instrument.*—A pleading asking the correction of a written instrument must show that there was fraud or mistake in its execution.

SAME.—A complaint in such case, for the correction of a deed, which simply alleges that one estate was agreed for and another conveyed, is insufficient.

PLEADING.—*Complaint for Review.*—A complaint for a review of a judgment, on account of matter discovered since the trial, must show that the plaintiff could not, by the use of reasonable diligence, have discovered the alleged new matter before the former trial.

From the Howard Circuit Court.

N. R. Lindsay and J. O'Brien, for appellants.

J. W. Cooper, M. Bell, and A. S. Bell, for appellees.

DOWNEY, J.—Lewis R. Himes died intestate, the owner of certain real estate, leaving a second wife, Nancy M. Himes, but no children by her. He left the appellees, children by a former wife. By agreement between the widow and the heirs, eighteen acres of the land were set off and conveyed to the widow for her life, as her share of the land, and she took possession of it. The instrument by which this land was assured to her by the heirs was not recorded. She conveyed this land to the appellant Mary Comer by a warranty deed. Mary Comer setting up a claim to this land in fee simple, the appellees, after the death of Nancy M. Himes, the widow of the deceased, sued her.

The complaint was in two paragraphs; the first to quiet their title, and the second to recover the possession of the land. Judgment was rendered in their favor.

This action was brought to review that judgment, on the ground of new matter discovered since the rendition of the

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judgment. The new matter and the facts relating to the discovery thereof are thus alleged :

“ And these plaintiffs say, that at the time they purchased the land herein described from the said Nancy M. Himes, and received a deed therefor, they believed they acquired a clear title in fee simple, and when the complaint herein referred to was filed against them, and at the hearing of the same, and until long afterward, they did not know, and had no means of knowing, that the facts stated in said complaint and the decree made in that behalf were not true, and hence made default in said cause, because not aware of any defence to that action ; but these plaintiffs now say, assert, and charge, that there is a good cause for a review of the proceedings and judgment of the court rendered in said cause, for the following material new matter discovered since the judgment in said cause, all of which was unknown to them at the time of the rendition of said judgment, to wit : At the death of Lewis R. Himes he was the owner of the west half of the north-west quarter of section 14, township 23, north of range 6, containing eighty acres ; also, another tract of eighty acres, in Kosciusko county ; also, property in the town of Tampico, in Howard county, the precise description of which land and town property is not known to the plaintiffs ; that after the death of said Lewis R. Himes, the defendants in this suit and Nancy M. Himes mutually agreed and contracted that said Nancy, instead of receiving a third in value of the whole of said land, to have and hold during her natural life, should receive the tract of land in question and hold the same in fee simple, and with title absolute in herself, her heirs, and assigns ; and they, said defendants, and said Nancy did mutually agree to a partition and division of the real estate of the deceased, and the said Nancy did receive and enter into the possession of said land, and continued to occupy the same until the date of the sale of said land to these plaintiffs, when they took possession and occupied said land until ejected and dispossessed by the judgment rendered by the Howard Circuit Court, as above stated. These plaintiffs further show, that at

the time of the partition and division of the said land, and when the share of said Nancy was set apart to her, a written instrument was prepared and duly executed, a copy of which is herewith filed and made part hereof; and in said instrument the said Nancy's share and interest in said real estate was described as a life estate, when, in truth and in fact, it was, by mutual consent and agreement of the parties, a fee simple, and not a life estate, which said Nancy was to receive, and which she conveyed to these plaintiffs. They further represent and show, that they did not discover the facts herein charged as to the true nature of the title of said Nancy in the land herein described, until long after the rendering of the decree herein spoken of, and that as soon as they did discover the facts herein stated and charged, they brought this their complaint to review and set aside said judgment; and the plaintiffs do now pray the court, for the material new matter herein stated, to open and review said judgment," etc.

A demurrer to the complaint was filed by the defendants, on the ground that it did not state facts sufficient to constitute a cause of action, which was overruled, and the defendants excepted.

The defendants answered in four paragraphs. The first paragraph was a general denial. The second and third were struck out, on motion of the plaintiffs. The fourth was held good on demurrer thereto. It contained the following averments: That the defendants are the heirs of Lewis R. Himes, deceased, who died intestate, in, etc., on, etc; that he left, as his heirs at law, his widow, Nancy M. Himes, by whom he had no issue, etc., who was a second wife, but left the defendants, his children by a former wife; that by reason of the said Nancy being a second wife, by whom he had no issue surviving him, but leaving children by a former wife, the said Nancy was only entitled to a life estate in the lands of her said deceased husband; and the defendants aver that in order that said Nancy might have the use, control, and occupation of her interest in the real estate of her said husband, and that said interest might be set apart to her, she and defendants entered into an agree-

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ment, a copy of which is filed, and made part of the answer, by which the land mentioned in the complaint was set apart to her as her one-third during life in the lands of the deceased, which she accepted, went into possession thereof, and received the rents thereof until she conveyed to the plaintiffs. It is then averred, that at the time of their purchase of said land, the plaintiffs had notice of said contract and agreement, and their purchase was made with full knowledge of all the rights of the defendants in said real estate; that said Nancy died on the 17th day of February, 1872, and the rights of the plaintiffs in said real estate then and thereby became extinguished; wherefore, etc.

A demurrer to this paragraph of the answer, which demurrer is not in the record, was filed by the plaintiffs and overruled by the court. The plaintiffs then replied to the fourth paragraph of the answer by a general denial.

There was a second paragraph of the reply, which was struck out by the court on motion of the defendants.

The trial of the issues was by a jury, and there was a general verdict for the plaintiffs, with answers to interrogatories as follows:

"1. Was the deed from the defendants to Nancy M. Himes for the eighteen acres of land described in the plaintiffs' complaint duly recorded in the record of deeds in the recorder's office of Howard county, Indiana; and if so, when?

"Ans. It was not.

"2. Was the provision in said deed that the grantee, Nancy M. Himes, should have and hold the same, said land, her natural life, inserted therein mutually by J. J. Boyne, who drafted the same, and was said deed so drawn by the direction of Samuel Himes, or any of the parties thereto?

"Ans. It was.

"3. Was said deed read over to and in the presence and hearing of Nancy M. Himes, in the office of J. J. Boyne, at the time or before she accepted the same?

"Ans. It was not.

"4. What is the character of the conveyance from Nancy

M. Himes to Mary Comer, of the eighteen-acre tract of land, whether a quitclaim or a warranty deed?

“Ans. A quitclaim.”

On motion of the defendants, the court rendered judgment in their favor on the special findings of the jury, notwithstanding the general verdict for the plaintiffs, and to this ruling the plaintiffs again excepted.

The plaintiffs then moved the court to grant them a new trial, which motion was overruled, and the plaintiffs again excepted.

The appellants have assigned the following errors:

1. Overruling their demurrer to the fourth paragraph of the answer.

2. Sustaining the motion of the defendants to strike out the second paragraph of the reply.

3. Sustaining the motion of the defendants for judgment on the answers to interrogatories of jury, over the general verdict.

4. In overruling the motion of the plaintiffs for new trial.

The appellees have assigned as a cross error the overruling of their demurrer to the complaint.

We will proceed to consider these alleged errors in their order, or so many of them as it may be necessary to consider in disposing of the case.

The first alleged error is the overruling of the demurrer of the plaintiffs to the fourth paragraph of the answer. This demurrer, as we have already said, is not set out in the record. Under these circumstances, nothing can be decided as to the alleged insufficiency of the pleading to which the demurrer was filed. It was said in *Crowell v. The City of Peru*, 41 Ind. 308: “When a demurrer has been filed and overruled, and the record does not contain the demurrer; we may well presume that it was overruled on account of its own defects, or because it presented some objection to the pleading to which it was not liable. If the demurrer has been sustained, and the pleading is not liable to any objection which could have been

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specified in the demurrer, the rule would probably be different."

The next alleged error is the striking out of the second paragraph of the reply. This question was not reserved in the circuit court by a bill of exceptions. When a pleading is struck out, it can only be brought into the record again by a bill of exceptions. This is a rule of practice which should be too well understood by this time to need such frequent application.

The third error assigned is the sustaining of the motion of the defendants for judgment on the special finding, notwithstanding the general verdict of the jury. This assignment is not so easily disposed of. We do not see the materiality of some of the interrogatories. The first, with reference to the recording of the deed, we think is wholly immaterial, for the reason that whether it was or was not recorded could have no bearing on the question whether Nancy M. Himes, the grantee therein, could or could not convey in fee the lands mentioned in the deed. Counsel for appellants seem to suppose that if her deed was not recorded she might, for that reason, convey a fee in the land, when, by the terms of the deed, she had only a life estate. This cannot be so. The fact that a deed conveying a limited estate has not been recorded cannot confer upon the grantee authority to convey a larger estate in the land than the deed purports to convey.

The answer to the third interrogatory was not decisive of any material question in the case. The mere fact that a deed to a party was not read over to and in the presence and hearing of the grantee in a particular office, at or before the time of its acceptance, cannot of itself render the deed invalid. It may have been read to the party elsewhere, or she may have known its contents without its having been read to her. Indeed, the reading of it to her was not necessary to its validity, unless possibly under special circumstances.

The fourth interrogatory was improperly put to the jury. It is the business of the court to construe written instruments affecting the rights of the parties, where there is no ambiguity

in them. *Symmes v. Brown*, 13 Ind. 318. In the fourth question the jury were required to decide as to the character of a deed in the case, whether it was a quitclaim or a warranty, and the jury decided the question in direct opposition to the language of the deed. The language of the deed is "convey and warrant," and yet the jury found the deed to be a "quitclaim." The court should have decided this question, and would, no doubt, have decided it more correctly than the jury did.

We have most difficulty with the answer to the second interrogatory. The question was this: Was the provision in the deed giving the grantee a life estate inserted therein, mutually, by the person who drafted the deed, and was it done by the direction of Samuel Himes or any of the parties thereto? What is meant here by the word "mutually?" We cannot say with any certainty what it means, or what the whole question and answer mean, and therefore, on account of this uncertainty, there is not such an inconsistency between this one of the special findings of the jury and their general verdict as warranted the court in disregarding the latter and rendering its judgment on the former. 2 G. & H. 206, sec. 337; *Ridgeway v. Dearing*, 42 Ind. 157; *Campbell v. Dutch*, 36 Ind. 504; *Amidon v. Gaff*, 24 Ind. 128.

Having arrived at the conclusion that the ruling of the court on this point was erroneous, we will, without an examination of the fourth alleged error assigned by appellants, examine the cross error assigned by the appellees. This cross error calls in question the sufficiency of the complaint.

We are of the opinion that the complaint is defective in two particulars at least. In the first place, it is not alleged that there was either fraud or mistake in the making of the deed from the appellees to Mary M. Himes. It is alleged that the agreement between the parties was that Nancy M. should have the land in fee simple; that a written instrument designed to carry out this agreement was made and duly executed, and a copy of it is filed with the complaint, and with the answer; that the estate of said Nancy M. was described therein as a

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life estate, when in truth and in fact it was, by the agreement, to have been a fee simple. There is here no allegation of any mistake in framing the instrument, or in any other respect. It is simply alleged that one estate was agreed for, and another accepted.

Courts correct mistakes in instruments, under proper circumstances, but do not relieve parties from positions in which they have placed themselves by their own consent, where there has been neither fraud nor mistake. The presumption is, that all previous negotiations between the parties to the contract terminated in the writing, and that it contains what was agreed upon by them. If by fraud or mistake the contract, as reduced to writing, is different from that which was agreed upon, the court may, in a proper case, grant relief; but not in such a case as this is shown to be. For anything that is alleged, Nancy M. Himes knew perfectly well, when she received the deed, that it conveyed to her an estate for life only in the lands in question. See *Oiler v. Gard*, 23 Ind. 212; *Gray v. Woods*, 4 Blackf. 432; *Hileman v. Wright*, 9 Ind. 126; *Baldwin v. Kerlin*, 46 Ind. 426.

The other objection to the complaint is, that it does not appear that the plaintiffs might not, by the use of reasonable diligence, have discovered the alleged new matter before the former trial. See *Simpkins v. Wilson*, 11 Ind. 541; *Jenkins v. Prewitt*, 7 Blackf. 329; *Bicknell Civ. Pr.* 357.

It is evident, at a glance, that the complaint in this case does not show the use of any diligence. If the agreement between the heirs and the widow was, that the widow should have a fee in the land, and not merely a life estate, and it was by mistake that the deed failed to state that fact, it would seem the most natural and convenient thing, under the circumstances, that the plaintiffs, when sued for the land which the widow had conveyed to them, should inquire concerning her title. She was their grantor, and had conveyed to them by a warranty deed purporting to convey a fee simple, and yet they do not show that they made any inquiry of any one as to her title.. They say they were ignorant

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of the fact, and did not obtain knowledge of it until after the judgment was rendered against them ; but that they made use of any diligence whatever, they do not aver.

The judgment is reversed, at the costs of the appellants, and the cause remanded, with instructions to sustain the demurrer to the complaint.

HUMPHREYS v. STEVENS ET AL.

PRACTICE.—Striking out a part of a pleading is not error, if the part which is left is sufficient to present the cause of action or defence.

CORPORATION.—*Voluntary Association.*—Two corporators, where all the others have withdrawn, are enough to continue a voluntary association, incorporated under the act of February 20th, 1867, 3 Ind. Stat. 550.

CITY.—*Deputy City Treasurer.*—There cannot be a deputy treasurer of a city, organized under the act of March 14th, 1867, 3 Ind. Stat. 63, without the approval and consent of the council of such city.

From the Miami Common Pleas.

M. Winfield, for appellant.

D. C. Justice, for appellees.

PETTIT, C. J.—This was an action of replevin by the appellant, David Humphreys, against the appellees, Chauncy W. Stevens, John T. Musselman, George W. Fender, Will C. Morcau, Graham N. Fitch, Dennis Uhl, Joseph Uhl, and the Democratic Printing and Publishing Association, commenced in the Cass Common Pleas, for a printing press and materials and property connected with it. A change of venue was taken to the Miami Common Pleas.

The transcript is in a very bad, imperfect, and probably an illegal condition. Among other things, it shows that the certificate of the clerk of the Cass Common Pleas Court to the papers and entries in that court on change of venue is four months later and after the date of the trial and judgment in

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the Miami Common Pleas. For this, it is insisted by the appellees, the judgment ought to be affirmed, as the record does not show that at the time of the trial the papers and pleadings now in the transcript were before the court on trial. We do not pass upon this question, but are inclined to the opinion that the judgment ought to be affirmed for this, if for no other reason. But as the appellant presents but two questions, which we think are against him, we prefer to decide the case upon them.

A fifth paragraph of reply to the second, second and a half, and eighth paragraphs of the answer was filed, in these words:

“ 5. The plaintiff, for a reply to the second, second and a half, and eighth paragraphs of answer, denies that there was at the commencement of this suit any such person or corporation as the Democratic Printing and Publishing Association, and that, if such ever existed, it has been since, and was, on the 30th day of November, 1872, dissolved ; that at its organization it consisted of eleven persons, all of whom, except two, had surrendered their act of corporation prior to that date ; wherefore the plaintiff prays judgment.”

The paragraph of the answer, to which this fifth paragraph of the reply was filed, set up and alleged, among other matters, that the property was owned by and belonged to the Democratic Printing and Publishing Association.

A motion was made by the appellees to strike out of the reply these words : “ That at its organization it consisted of eleven persons, all of whom, except two, had surrendered their act of incorporation prior to that date ; wherefore plaintiff prays judgment.”

This motion was sustained, and this ruling is assigned for error.

We think there was no error in this. The question of an existing voluntary association or incorporation, under the act of February 20th, 1867, 3 Ind. Stat. 550, as to this association, was fully and sufficiently set out and denied in the remaining part of the reply, without the words stricken out, and therefore striking them out could do the appellant no harm. But there

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were, taking the reply for true, two corporators left as and for a corporation, which were enough to continue the association or corporation under the act above referred to.

The next and only remaining question in the case is, can there be a deputy treasurer of a city organized under the act of March 14th, 1867, 3 Ind. Stat. 63, without the approval and consent of the council of such city? We think, and hold, there cannot, and that the acts of any man claiming to be a deputy treasurer of a city are void if the city council has not approved of the appointment, or given its consent to the same.

Section 8 of the charter provides, that "the said clerk, assessor, treasurer, and marshal, with the consent of the common council, may appoint one or more deputies when necessary."

There is no provision of the charter that allows or authorizes the appointment of a deputy city treasurer without the consent or approval of the city council.

The judgment is affirmed, at the costs of the appellant.

BIDDLE, J., was absent.

THE CITY OF LOGANSPORT v. McMILLEN.

EVIDENCE.—*Appropriation of Land for Street.*—*Opinion of Witness as to Damages.*—On the trial of a proceeding by a city to condemn certain land for the purposes of a street, it is improper to ask a witness the value of the strip of land appropriated, considered with reference to the manner the appropriation affected the remainder of the land.

SAME.—The opinion of the witness as to the value of the land appropriated may be taken, but the damage to the residue cannot be proved by the opinions of witnesses; the facts, circumstances, and situation may be shown, and from them the jury may estimate the damages.

From the Cass Circuit Court.

• *M. Winfield*, for appellant.

McConnell & Nelson, for appellee.

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WORDEN, J.—This was a proceeding by the city to condemn certain land for the purposes of a street, called Bates street. McMillen, being the owner of a portion of the land to be condemned, appealed from the assessment of benefits and damages made by the commissioners to the court of common pleas, and the case finally passed into the circuit court for trial. In the latter court, the cause was submitted for trial to the court, and the court found, that McMillen's damages exceeded the benefits in the sum of one hundred and ninety-five dollars, which the city ought to pay; and it was adjudged that the appropriation of the land stand confirmed.

The city moved for a new trial, but her motion was overruled.

There is but one question raised in the cause, and that relates to the admission of certain evidence.

McMillen, by his counsel, propounded to several witnesses the following question, viz.: "What was the value of the strip of land appropriated as McMillen's, for Bates street, considered with reference to the place taken out and the manner the appropriation affected the remainder of the land?"

This question was objected to by the city, when put to the several witnesses, on the ground that it was improper and incompetent evidence, and on the ground that the damages could not be shown in that way; but the objection was overruled, and exception taken.

The question was answered, in several instances, "five hundred dollars an acre," and in one instance, "two hundred and fifty or three hundred dollars an acre."

While it was competent for the witnesses to give their opinions as to the value of the land appropriated, it was not competent for them to give their opinions as to the damages which would result to the residue of the land from the appropriation. *Evansville, etc., R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Sinclair v. Roush*, 14 Ind. 450; *Bissell v. Wert*, 35 Ind. 54.

The value of the land appropriated is one thing, and this value is, of course, to be considered in determining how much the owner is damaged by the appropriation. But how much

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the residue of his land is damaged by the appropriation, is another and different thing. The damage to the residue cannot be proved by the opinions of witnesses, but the facts, circumstances, and situation may be shown, and from these the court or jury trying the cause may estimate the damages.

The question, so far as it seeks the opinions of the witnesses as to the value of the land appropriated, is right. Perhaps it is not objectionable, so far as it seeks opinions as to the value of the strip appropriated, "considered in reference to the place taken out," as this may refer to the identity of the land appropriated. But so far as it seeks the opinions of the witnesses as to the value of the strip appropriated, "considered with reference to * * * the manner the appropriation affected the remainder of the land," it is clearly wrong. The question, taken as a whole, was objectionable.

There is a fallacy in the question itself well calculated to mislead the minds of the witnesses. It assumes that the value of the strip appropriated may be enhanced or diminished, or in some way influenced by the effect which its appropriation may have upon the residue of the land. If the residue of the land was injuriously affected by the appropriation of the strip for the street, that was a circumstance entitling the owner to damages therefor; but it could in no way affect the value of the strip appropriated. And the damages arising from such injurious effect upon the residue could not be proved by opinions. The question presented to the minds of the witnesses two distinct elements as going to make up the value of the land appropriated; first, the value of the strip appropriated, considered by itself; and, second, the value considered in reference to the manner the appropriation affected the residue of the land. The witnesses must clearly have understood from this that, in fixing the value of the strip appropriated, they were at liberty to consider, as entering into that value, the injurious or beneficial effect which the appropriation had upon the residue of the land. Thus, the question as put involved two points, one upon which the witnesses could, and one upon which they could not, express opinions; and, being

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put as an entirety, was objectionable, and the objection should have been sustained. The question involved, it should perhaps be observed, was properly saved.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

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PRACTICE.—*Amendment of Pleading.—Discretion of Court.—New Issue.*—The granting of leave to amend pleadings after the issues have been closed and before trial, and on the trial, is very much within the sound legal discretion of the lower courts, and, where the amendment makes a new issue or adds a new cause of action or ground of defence, should only be granted in a proper case and upon good cause shown by affidavit.

SAME.—*Application for Delay by Reason of Amendment.*—When an amendment is made and the opposite party does not, by motion supported by affidavit, ask for delay to complete the issues when rendered necessary by such amendment, or to prepare for trial, the presumption will be indulged by the Supreme Court that such party was not prejudiced by such amendment; but if an application is made for delay, either to plead or prepare for trial, and is overruled, then the Supreme Court will determine whether there has been such an abuse of discretion as injuriously affected the rights of such party.

SAME.—Where a court overrules an application for leave to amend, in the cases above stated, the Supreme Court will, in the absence of a showing that there has been an abuse of discretion prejudicial to the rights of the party applying, presume that the action of the court was correct.

From the Henry Circuit Court.

M. E. Forkner and E. H. Bundy, for appellant.

J. Brown and R. L. Polk, for appellee.

BUSKIRK, J.—The original complaint alleged that the appellant was indebted to the appellee in the sum of three hundred and forty dollars, for work and labor and materials furnished in building and constructing a partition brick wall, at the instance and request of appellant, a bill of particulars

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of which was filed with the complaint, which remained due and wholly unpaid.

The appellant answered by the general denial. The cause was tried by the court. Upon the trial, the appellee offered in evidence the following written instrument :

“This indenture witnesseth, that we, Isaac Mendenhall and Rachel Mendenhall, his wife, of Henry county, in the State of Indiana, convey and warrant to L. L. Burr, of the county and state aforesaid, for and in consideration of the premises hereinafter stated, to wit, the right and privilege to the said Burr to join to his, the said Mendenhall's, west wall on lot No. 5, in block No. 7, in the original plat of the town of Newcastle, and next adjoining to the east line of the said L. L. Burr's lot, being part of the lot and block aforesaid, and the privilege of building said wall one story or more higher than the brick wall of the said Mendenhall, and extend said wall ten feet north, and not to injure the chimneys of the said Mendenhall, but to carry up the same, the said Burr is to build an additional wall up to the first floor, provided, always, that at the time that the said Burr should join to said wall, he is to pay to the said Mendenhall one-half of the amount it would cost to put up such a wall at the time of adjoining the same, and the same privilege is to be extended to said Mendenhall should he want to build higher or farther back. The said L. L. Burr is to have credit for the east cellar wall as against the west cellar wall of the said Mendenhall's so far as it goes in thickness.”

The above instrument was duly signed, acknowledged, and recorded. The appellant objected to the introduction of the same in evidence upon the following grounds :

1. That said instrument did not tend to prove any or disprove any issue in said cause.
2. That it was irrelevant and immaterial.
3. That the suit was brought to recover for work and labor and materials furnished in building and constructing a partition wall, and not for the privilege of adjoining to a wall

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already built, or to recover the consideration of the easement conveyed by plaintiff to defendant in said instrument in writing.

Whereupon the plaintiff asked leave of the court to amend his complaint by inserting the following words, to wit: "And in the further sum of three hundred and fifty dollars for the right and privilege of adjoining to a brick wall heretofore sold and conveyed by the plaintiff to the defendant, a bill of particulars of which is filed herewith, immediately following the words 'a bill of particulars of which is filed herewith,' in the original complaint as above set forth;" which leave to amend said complaint was granted, and the plaintiff then and there made such amendment, and after the same was so made, overruled the objections to the introduction of said instrument in evidence and permitted the same to be read in evidence.

The appellant objected and excepted to the leave to amend and to the introduction of such instrument in evidence, and these were the only reasons assigned for a new trial that are relied on here. There was no application for delay or continuance on account of such amendment, or motion to tax the costs of such amendment. It is conceded by counsel for appellant that the instrument in question was properly admitted in evidence after the amendment was made. The sole question for our decision is, whether the court erred in permitting such amendment to be made.

There is an irreconcilable conflict in the decisions of this court in reference to the power and duty of the lower courts to permit amendments of the pleadings, on the trial, which change the issue or make a new issue. The right to make such amendments was recognized, subject to conditions and with limitations therein stated, in the following cases: *The Wayne County Turnpike Co. v. Berry*, 5 Ind. 286; *Taylor v. Dodd*, 5 Ind. 246; *Ostrander v. Clark*, 8 Ind. 211; *Trees v. Eakin*, 9 Ind. 554; *Kerstetter v. Raymond*, 10 Ind. 199; *Kerschbaugher v. Slusser*, 12 Ind. 453; *The Danville, etc., Co. v. The State*, 16 Ind. 456; *Holcraft v. King*, 25 Ind. 352; *Mason v. Seitz*, 36 Ind. 516; *De Armond v. Armstrong*, 37 Ind. 35;

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Koons v. Price, 40 Ind. 164; *Maxwell v. Day*, 45 Ind. 509; *Hackney v. Williams*, 46 Ind. 413.

On the other hand, the right to make such amendment on trial has been expressly denied in the following cases: *Miles v. Vanhorn*, 17 Ind. 245; *Thompson v. Jones*, 18 Ind. 476; *Hoot v. Spade*, 20 Ind. 326; *Landry's Adm'r v. Durham*, 21 Ind. 232; *Harris v. Mercer*, 22 Ind. 329.

It will be observed, that the earlier and later decisions of this court, computing time with reference to the adoption of the code, accord with what was the manifest intention of the framers of the code, and that was to secure a speedy trial of causes upon their merits, disregarding all mere formal and technical objections. This intention is manifested in sections 97, 98, and 99 of the code, which prescribe what amendments may be made, and how a party may be relieved against a judgment taken against him by his mistake, inadvertence, or excusable neglect.

The granting of leave to amend the pleadings after the issues are closed, and before the commencement of the trial, and on the trial, is very much within the sound legal discretion of the lower courts, and should only be granted in a proper case and upon good cause shown by affidavit, where the amendment makes a new issue or adds a new cause of action or ground of defence.

When an amendment is made, and the opposite party does not, by motion supported by affidavit, ask for delay to complete the issues, when rendered necessary by such amendment, or to prepare for trial, the presumption will be indulged by this court that such party was not prejudiced by such amendment; but if an application is made for delay, either to plead or prepare for trial, and is overruled, then this court will determine whether there has been such an abuse of discretion as injuriously affected the rights of such party. And, on the other hand, where the court overrules an application for leave to amend in the cases above stated, this court will, in the absence of a showing that there has been an abuse of discre-

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tion which prejudiced the rights of such party, presume the action of the court was correct.

It seems to us that the above rule will best subserve the ends of justice, and will relieve this court from the labor of passing upon questions relating to amendments in the lower courts, where there was no statement of facts showing how the party had been prejudiced.

The amendment made in the present case added a new cause of action, but there was no application for delay to plead or to meet, on the trial, the new cause of action. It is quite reasonable to suppose that such an application would have been granted; but if it had been refused, we would have in the record the facts showing how the rights of the appellant had been injuriously affected. We cannot say, as a matter of law, that the appellant was injured by such amendment, and we have no facts showing an abuse of discretion.

The amendment having been made, the court committed no error in admitting in evidence the deed heretofore set out.

The judgment is affirmed, with costs.

 GLENN v. PORTER.

PROMISSORY NOTE.—Pleading.—In a complaint upon a promissory note payable “at the First National Bank of New Albany,” it is not necessary to allege that New Albany is in this State, and that the bank named is located there.

SAME.—Commercial Paper.—Negligence of Maker.—In an action on a promissory note, payable in a bank in this State, brought by an innocent indorsee for value before maturity, an answer by the maker alleging that two strangers came to the maker and asked him to sign a paper which they said was a “letter of agency,” and he signed it, and it turned out to be commercial paper, where it is not alleged that he could not read, shows negligence on the part of the maker, and is not good.

SAME.—Want of Consideration.—Want of consideration is not a good answer to a suit by an innocent indorsee, for value, before maturity, of commercial paper.

SAME.—Evidence.—Where a general denial is answered to a complaint on a note alleged to have been indorsed in writing to the plaintiff, the indorsement must be read in evidence.

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From the Harrison Common Pleas.

S. J. Wright, A. Stephens, and L. Jordan, for appellant.

W. A. Porter, for appellee.

PETTIT, C. J.—This suit was brought by the appellee, William A. Porter, against the appellant, John Glenn, on the following note :

“ CORYDON, HARRISON COUNTY, INDIANA, }
“ November 14th, 1870. }

“ Nine months after date, I promise to pay Miles & Spaulding, or bearer, four hundred and two dollars and fifty cents, payable at the First National Bank of New Albany, for value received, with interest, without relief from valuation or appraisement laws. Interest at ten per cent. per annum after maturity, and attorney’s fees if suit be instituted. The drawer waives presentment, protest, and notice of protest and non-payment of this note. JOHN GLENN.”

Endorsed : “ MILES & SPAULDING. November 16th, 1870.”

The counsel for the appellant, in their brief, insist that the complaint is bad, because it does not allege that New Albany is in this State, and that the bank named in the note is located there. These objections are untenable.

We take judicial notice of the locality of New Albany, and the maker of the note held out to the world that the bank was there.

The defendant answered in five paragraphs, the fourth of which was as follows :

“ 4. And for a further answer to said complaint, defendant says that his signature was obtained to the paper sued on, which is filed as a part of the complaint herein, by the payees thereof, the said Miles and Spaulding, in the following manner, and no other, to wit : on or about the 14th day of November, 1870, two men came to his house, in Harrison county, Indiana, representing themselves as agents for the sale of a patent, which they called “ The Screw Hay Fork,” and solicited him to become their agent for the sale thereof, in Harrison, Scott, Washington, Heth, Boone, Webster, and Taylor

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townships, in Harrison county, Indiana ; and defendant says he did consent to take such agency, and thereupon one of them filled up a printed blank, which they called a letter of agency, whereby they professed to constitute defendant sole agent for the sale of said patent as stated aforesaid, for which defendant was not to pay anything, but was to account at an agreed rate for the proceeds of sale after said fork should be sold. And that they further represented that defendant should sign said paper for them to retain as their authority in accounting to their principal for the territory by them sold, and that a similar paper signed by them should be retained by defendant as his authority to sell said fork in said county. And defendant avers that at said time said parties were in defendant's field ; that defendant was very cold, it being November, and said parties, calling themselves Miles and Spaulding, represented that their time was very valuable, and that they were in a very great hurry ; said defendant signed said paper, believing he was only signing the necessary paper to complete said agreement as to said agency, and without any knowledge or intention on his part of signing any instrument for the payment of money, and not intending to sign any promissory note of any description whatever ; wherefore, defendant says that the note sued on is not his act and deed."

This paragraph of the answer was sworn to by the defendant, and a demurrer, for want of sufficient facts, was sustained to it, and this ruling is assigned for error.

We think this paragraph of the answer fails to show proper caution and vigilance on the part of the maker of the note, but, on the contrary, it is plainly to be inferred that he was negligent. Two strangers came to him and asked him to sign a paper which they said was one thing ; he signed, and it turned out to be commercial paper. The answer does not show that he could not read.

We think a suit by an innocent indorsee, for value, before maturity, cannot be defeated by such an answer. *Nebeker v. Outsinger*, 48 Ind. 436.

But if this paragraph was good, we cannot see that the

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defendant was injured by sustaining a demurrer to it; for there was also a general answer of *non est factum* sworn to on file, under which all the evidence might be, and, in fact, was given, that could have been given under the fourth paragraph, to which the demurrer was sustained.

The second paragraph of the answer was want of consideration generally. To this a demurrer, for want of sufficient facts, was properly sustained. Such an answer is not good against an innocent indorsee for value, before maturity, of commercial paper. There is no error in the record for the rulings of the court below on the pleadings.

The question of the sufficiency of the evidence to justify the verdict is before us.

The complaint alleges, that on the 16th day of November, 1870 (two days after the note was made), Miles & Spaulding, the payees, by their written indorsement, assigned the same to the plaintiff.

The first paragraph of the answer was a general denial. This put in issue the indorsement and assignment of the note.

The evidence is all before us in a bill of exceptions, and it fails to show that the indorsement, or assignment, was read in evidence. This should have been done, and the evidence without this proof was, and is, insufficient to sustain the verdict. This is not a conflict, but a failure of evidence. 2 Greenl. Ev., sec. 163, p. 145; *Fosdick v. Starbuck*, 4 Blackf. 417.

The court below erred in overruling the motion for a new trial.

The insufficiency of the evidence to sustain the finding being the leading and principal question in the motion for a new trial, and we having determined that it was not sufficient, we need not consider any minor cause for a new trial.

The judgment is reversed, at the costs of the appellee, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Keller v. Williams.

KELLER v. WILLIAMS.

PROMISSORY NOTE.—*Transfer by Endorsement.—Requisites of.*—In order to transfer a promissory note so as to enable the holder to sue the maker thereon without making the assignor a party, the transfer must be made by endorsement, so as to vest the legal title in the endorsee.

SAME —*Meaning of Endorsement.*—The word endorsement implies a transfer by a writing upon the instrument transferred.

SAME.—*Pleading.*—In a suit upon a promissory note by the holder, where it is alleged that the note was assigned in writing by the payee, the inference is that the assignment was by a separate instrument, and such averment is not equivalent to an averment that the payee endorsed the note to the holder.

SAME.—Where an endorsee sues the maker of a note, he need not set out a copy of the endorsement, but it is necessary to show by averment how he acquired the note, whether by endorsement or otherwise.

From the Tipton Circuit Court.

J. W. Robinson, for appellant.

J. Green, D. Waugh, G. Gifford, and J. N. Waugh, for appellee.

WORDEN, J.—Williams sued Keller, and the following was the complaint, after entitling the cause and specifying the court, viz:

“John W. Williams complains of Robert H. Keller, and says that, on the 1st day of September, 1867, Robert H. Keller executed his promissory note, due one day after date, for forty dollars, value received, bearing ten per cent. interest, without relief from valuation and appraisement laws, to John Darrow. The note was assigned in writing by John Darrow to Isaac Shaw, by Shaw to John W. Williams; that said note is wholly due and unpaid; wherefore the plaintiff prays judgment for sixty-three dollars and twenty cents, and ten per cent. interest from date. A copy of said note being filed herewith and made a part hereof.”

A copy of the note followed.

The defendant filed a demurrer to the complaint, assigning for cause, 1. “That there is a defect of parties defendant, to wit, the non-joinder of John Darrow, who is a necessary

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defendant in this cause ;” and, 2. That the complaint did not state facts sufficient, etc.

The demurrer was overruled, and the defendant excepted. Such further proceedings were had in the cause as that final judgment was rendered for the plaintiff.

The first error assigned calls in question the correctness of the ruling on the demurrer. The language of the pleading in reference to the transfer of the note from Darrow to Shaw is, that “the note was assigned in writing by John Darrow to Isaac Shaw.”

The statute on the subject of promissory notes, etc., provides, that they “shall be negotiable by endorsement thereon, so as to vest the property thereof in each endorsee successively.” 2 G. & H. 658, sec. 1. Then the statute on the subject of parties provides, that “when any action is brought by the assignee of a claim arising out of contract, and not assigned by endorsement in writing, the assignor shall be made a defendant, to answer as to the assignment, or his interest in the subject of the action.” 2 G. & H. 38, sec. 6.

There may be an equitable transfer of a promissory note or other instrument without endorsement. But in order to effect a legal transfer, it must be done by endorsement. So, in order to transfer a promissory note so as to enable the transferee to sue the maker thereon without making the assignor a party, the transfer must be made by endorsement, so as to vest the legal title in the endorsee. “Endorsement” is the term applied by the statute to both cases. The word has a known legal significance, and implies a transfer by a writing upon the instrument. Thus, in *Cooper v. Drouillard*, 5 Blackf. 152, it was held that an averment that the payees indorsed the note was substantially an averment that they assigned it by a writing on the back of the note, under their own hands. See, also, *Kern v. Hazlerigg*, 11 Ind. 443.

It should, perhaps, be observed that as there is no limit to the number of successive endorsements that may be made upon a promissory note, if they cannot all be written on the note itself, a paper may be annexed thereto, called in France, *alonge*, on

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which the latter endorsements may be written, and which will be deemed a part of the note, and of the same obligation as if written upon the note itself. Story Pr. Notes, sec. 151.

The word "assigned," that employed in the complaint, has no such fixed signification. The averment is, that the note was assigned in writing. It may have been assigned in some separate instrument, and not upon the note ; and the inference is that the assignment was in a separate instrument, as, had it been upon the note, the term endorsed would have been more appropriately used.

The assignee of a note thus suing the maker should show by the averments of his complaint the mode in which the assignment was made, as, if made otherwise than by endorsement, he must make the assignor a party. *Barcus v. Evans*, 14 Ind. 381.

We cannot construe the averment in the complaint as equivalent to an averment that Darrow endorsed the note to Shaw, and cannot hold, therefore, that Darrow was not a necessary party. The demurrer points out specifically the non-joinder of Darrow, and should have been sustained. See *Strong v. Downing*, 34 Ind. 300.

It may not be out of place to observe that, although the complaint does not profess to give a copy of the assignments, yet a copy of them follows the copy of the note in the transcript. The first is as follows : "September 1st, 1868, I assign the within note to Isaac Shaw, Sr." This is not signed by any one. Then follows an endorsement of the note by Shaw to Williams.

Where an endorsee sues the maker of a note, he need not set out a copy of the endorsements, because the endorsements are not the foundation of his action. It is necessary, however, for him to show by averments how he acquired the note, whether by endorsement or otherwise, in order that it may be known whether the assignor is a necessary party. *Treadway v. Cobb*, 18 Ind. 36. If the copies of the assignments would aid the complaint by showing an endorsement of the note by Darrow to Shaw, still we could not look to them for that pur-

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pose, inasmuch as by more recent decisions it is established that where documents are set out as parts of pleadings, not the foundation of the action or defence, as the case may be, such documents cannot be looked to for the purpose of aiding or invalidating the pleadings. *The Excelsior Draining Co. v. Brown*, 38 Ind. 384; *The Etchison Ditching Association v. Busenback*, 39 Ind. 362; *Brooks v. Harris*, 41 Ind. 390; *Trueblood v. Hollingsworth*, 48 Ind. 537. There are other cases to the same effect, not collected here.

But if we could look at the assignments as set out, they would not aid the plaintiff, inasmuch as Darrow has not signed any, nor does his name appear in them at all. The statement set out purporting to assign the note to Shaw, but signed by no one, does not amount to an endorsement by Darrow.

There are some other questions sought to be raised in the cause by the appellant, but as they can only be presented by a bill of exceptions, and as the bill of exceptions in the record was filed too late, we will not consider them.

The judgment will have to be reversed for the error in overruling the demurrer to the complaint.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

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LIQUOR LAW.—*Sale of Liquor to be Drank on the Premises.*—Where intoxicating liquor is sold in ordinary beer glasses, carried from the room, and drank on the lot belonging to the premises, and the glasses are returned, it will be presumed to have been a sale of liquor to be drank on the premises.

MOTION FOR NEW TRIAL.—*Newly-Discovered Evidence.*—On a conviction for an illegal sale of intoxicating liquor to one B., a motion for a new trial on the ground of newly-discovered evidence, in this, that one C. deceitfully

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and fraudulently brought about the alleged violation of law by purchasing the liquor, etc., is bad.

SAME.—The fact that a party was deceived into a violation of law by one who was employed as a detective will not be a justification.

SAME.—*Insufficient Excuse for Not Producing Affidavit.*—On a motion for a new trial on the ground of newly-discovered evidence, it is not a sufficient excuse for not producing the affidavit of the witness, to say that the witness is interested adversely to the party making the motion.

SAME.—*Witness Compelled to Make Affidavit.*—On a proper application to the court, the court may require such witness to make his affidavit.

From the Decatur Circuit Court.

C. Ewing and J. K. Ewing, for appellant.

C. A. Buskirk, Attorney General, and *R. D. Doyle*, for the State.

BIDDLE, J.—Prosecution by indictment for selling intoxicating liquor, to be drunk on the premises. Trial by the court below, conviction, and fine, and appeal to this court. Two points are made against the overruling of the motion for a new trial :

1. The insufficiency of the evidence to sustain the finding.
2. Newly-discovered evidence.

The sale, character of the liquor, name, etc., are proved beyond reasonable doubt ; but the appellant claims that it was not sold to be drunk on the premises.

John W. Tice testified as follows : “ When we asked for the beer, he drew two glasses ; we took them out and drank them, brought them back and paid him ; I don’t know whether the lot on which we drank belonged to the premises or not ; there was no fence between the building and where we drank ; think there was a pavement made of boards ; think it was enclosed by a fence in the same lot where the building stood.”

Cross-examined : “ I do not know whether Rater told me where to go to drink it or not ; defendant was not present, and did not see us drink ; I don’t think he had any knowledge of where we drank ; I have no recollection whatever of Mr. Rater telling us where we should drink it ; he might have told us to go off the premises to drink.”

Jefferson Jordan testified : “ We took the glasses after the

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defendant had filled them up, and went into and through another room of the building and out of a door into the lot, and drank it about two steps from the door, then took the glasses back to defendant, and Tice paid for it; this door was south of the building; the place where we drank is in the same enclosure that encloses the house where it was sold, and belonged to the premises."

Cross-examined: "I don't know why we went into the back yard to drink; Tice picked up his glass, and I started and followed; defendant could not see us drinking from where he was selling; he could see us when we went into the adjoining room; defendant said nothing to us, that I recollect, about not drinking on the premises; he did not remonstrate against us going out in that direction; I have not taken any active part in this prosecution."

James K. Ewing testified: "There is a vacant space of ground on the south side of this building, fifteen or twenty feet wide, belonging to the building and premises; the forty by one hundred and sixty [feet] is within the same enclosure with the house."

The defendant testified: "I recollect the occasion of selling these men beer; I had no knowledge of where they were going to drink it; there were two doors leading into the alley on the north side of the house; I gave no consent for them to drink on my premises; I don't know where they drank it."

Cross-examined: "I saw these witnesses going into the adjoining room; there are two doors leading into the alley on the north; both the doors leading into the alley are from the room back of the bar-room; I did not follow these men to see where they went; there is a door also leading out to the well on the south."

This is substantially all the evidence given as to the place where the liquor was to be drunk, and we think it is sufficient. The appellant could very easily have prevented the liquor from being drunk on his premises, by using the proper means. His ignorance of the fact as to where the purchaser intended

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to drink the liquor, or where it actually was drunk, will not excuse him.

It seems that the liquor was sold in ordinary beer glasses, belonging to the appellant; without some other means more convenient to carry it away, he had reason to know that the liquor would be drunk on his premises; and, knowing this, he must be held to have sold it to be drunk on his premises, unless he took proper means to prevent it. *Eisenman v. The State*, post, p. 511; *O'Connor v. The State*, 45 Ind. 347.

In support of his second point, the appellant filed his affidavit in the following words:

“Andrew Rater, on his oath, says that his conviction in this action was procured by fraud and deceit, in this, to wit: that Jefferson Jordan, the principal witness for the State herein, was a hired spy and detective in the employment of a secret organization known as ‘Good Templars,’ whose purpose was and is to suppress intemperance; that said Jordan deceitfully and fraudulently brought about the alleged violation of law by purchasing the liquor named in the indictment herein, and by representing to this defendant that he would carry the same off of the premises and drink it; that said Jordan and said Tice did leave the defendant’s bar-room, and did go out of sight, to drink, and purposely deceived the defendant, for the purpose of procuring his conviction; that this defendant did not know of any conspiracy against him until after his trial, but discovered the same since; that said Jordan is adversely interested against him herein, and he cannot therefore produce his affidavit in support of his motion; and further saith not.”

There are several objections to the sufficiency of this affidavit:

1. The indictment alleges the sale to have been made to John Tice. Jardon therefore could not have “deceitfully and fraudulently brought about the alleged violation of law by purchasing the liquor named,” etc.

2. The matters stated in the affidavit would not have been material to the defence. The conduct of Jardon, as alleged,

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would neither have justified nor excused the appellant for a violation of the law.

3. It does not show proper diligence in obtaining the alleged newly-discovered evidence. The conduct of Jardon in reference to the sale was open to the view of the appellant at the time the sale was made, and must have been fully known to him after the finding of the indictment.

4. The excuse given for not furnishing the affidavit of Jordan as to what he would swear, is not sufficient. It shows no effort to obtain it. It is not enough to say that Jardon was "adversely interested against him." On proper application to the court, Jordan might have been compelled to make his affidavit of such facts as were within his knowledge.

For the requisites necessary to support a motion for a new trial on account of newly-discovered evidence, see the following authorities: *Simpson v. Wilson*, 6 Ind. 474; *Bronson v. Hickman*, 10 Ind. 3; *The State, ex rel. Druliner, v. Clark*, 16 Ind. 97; *Glidewell v. Daggy*, 21 Ind. 95; *Rickart v. Davis*, 42 Ind. 164; *Bartholomew v. Loy*, 44 Ind. 393.

There is no error in the record.

The judgment is affirmed.

EISENMAN v. THE STATE.

LIQUOR LAW.—Sale to be Drank on Premises.—Information.—In an affidavit or information for selling intoxicating liquor to be drank upon the premises where sold, under the act of February 27th, 1873, it is not necessary to allege that the liquor was drank on the premises, or that it was drank anywhere.

SAME.—Where there is an enclosure in the rear of, and in view of, a place where intoxicating liquors are sold, where persons can drink under the protection of a high fence, and where they are in the habit of drinking, and where liquor sold is delivered in vessels, and drank from glasses furnished by the person making the sale, and carried when bought in the

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direction of the enclosure, and the empty vessels are returned, it may be inferred that the liquor was sold to be drank on the premises, though the persons buying were told it must not be drank on the premises.

SAME.—Where one witness, who drank of liquor sold, testifies that in his opinion the liquor was intoxicating, and that it made him drunk, it will authorize a finding that the liquor was intoxicating.

From the Decatur Circuit Court.

C. Ewing and *J. K. Ewing*, for appellant.

C. A. Buskirk, Attorney General, *R. D. Doyle*, and *O. B. Scobey*, Prosecuting Attorney, for the State.

DOWNEY, J.—Prosecution against the appellant under the act of February 27th, 1873, for selling intoxicating liquor to one Carter Loyd, to be drank in and upon the premises where sold, without a permit, commenced before a justice of the peace. There was a conviction before the justice of the peace, and an appeal by the defendant to the circuit court.

The prosecution was upon an affidavit, a motion to quash which was made in the circuit court, and overruled.

In the circuit court, the cause was tried by the court, and the defendant was again found guilty. A new trial was asked by the defendant, on the grounds :

1. That the finding of the court was contrary to the law ; and,
2. It was contrary to the evidence.

This motion was overruled, and sentence was pronounced against the defendant.

He has assigned for error here :

1. Overruling his motion to quash the affidavit.
2. Refusing to grant a new trial ; and,
3. Rendering final judgment against the defendant.

The objection urged against the affidavit is, that it does not allege that the liquor was drank on the premises where it was sold. The prohibition is against selling the intoxicating liquor "to be drank in, upon," etc., without a permit ; sec. 1 of the act. It is not necessary to the completion of the offence, that the liquor shall be drank on the premises, or that it shall be drank anywhere. The offence consists in selling it to be drank

on the premises, without the required permit. The affidavit alleges a sale of the liquor to be drank on the premises, without a permit, and is, therefore, sufficient.

Under the second assignment of error it is insisted, that the evidence does not show that the liquor was sold to be drank on the premises where sold. We will examine the evidence, and see what it does show. The liquor charged to have been sold was beer.

Carter Loyd testified as follows: "I never bought any liquor of defendant—no wine, nor beer, nor whisky," etc.

William H. Isgrigg: "I saw Carter Loyd buy liquor of defendant, some two or three months ago, in Decatur county, Indiana; it was beer; beer is intoxicating; it made me drunk on that occasion; he drank the liquor inside the fence in the back lot of the defendant's premises; about one-half of the back lot is fenced off to itself, and the beer was drank in the part of the lot farthest back from the saloon; I saw the liquor paid for, but do not know how much; Carter Loyd, Jesse West, and I were together; Loyd bought the liquor of defendant, and we all drank it in defendant's back yard; the beer was taken out into the back yard, and the vessel returned; I took the glasses out of the saloon, and drank out of them; I was at the back door when the beer was purchased by Loyd; there was nothing said about borrowing the quart cup and glasses; defendant Eisenman told us to go off the premises, and we said we would, but did not; I have seen other persons drinking on that lot where we drank; there is a small low fence at the back part of the lot; we drank about eighty feet from the saloon, and in sight of it; there is a high fence that conceals the place; we took the glasses back, and gave them and the quart cup to the defendant."

Nathan Withers: "I have seen persons drinking in defendant's back lot several times, in the same place spoken of by William H. Isgrigg; I have seen them come back from the place, with empty beer-glasses, enclosed with a fence six feet high, and next to the livery stable; this place has been there

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several years ; this place is about one hundred feet back of the saloon."

James T. Gillam : "Saw defendant sell a quart of beer to two men, in a quart cup, and furnish them with glasses and the vessel, but told them to go off the premises to drink it."

The defendant testified in his own behalf, as follows : "I do not recollect of selling beer to Loyd ; have no recollection about it ; it is my universal custom to tell every man I sell to to take it off my premises ; I never permitted any one to drink on my lot, and never knew that Carter Loyd and Isgrigg drank there ; I have employed a man busy days to see that none drank on my premises ; when I furnish the vessels and the beer and glasses, I generally tell them to go off my premises, most generally follow them to the door."

Some parts of this evidence tend to show that the defendant did not sell the liquor to be drank on his premises, and other parts tend the other way. The statements of the defendant, made to purchasers, that they must not drink on his premises, are in his favor. But the fact that he had a place in the rear of his saloon where customers could drink under the protection of a high fence, and where, we think, he must have known they were in the habit of drinking ; that he did not deliver the liquor to the purchasers in their own vessels to be taken away, but allowed them to take it out into his lot in his vessels, and use his glasses in drinking it, are circumstances from which we think the court was justified in finding that he sold the liquor to be drank on his premises, notwithstanding his formal request that that should not be done. The place where the liquor was drank was in view of the saloon ; the defendant knew that the liquor was taken out at the rear of his saloon, in his vessels, and that the vessels were returned to him empty. This was done repeatedly. On this point we ought not to disturb the judgment of the circuit court.

It is claimed also, that the evidence does not show beyond a reasonable doubt a sale of liquor. This was a question for the jury. The evidence was conflicting. It is not for us to

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say which of the witnesses the jury ought to have believed, and which disbelieved. Isgrigg swears to a sale.

It is also suggested, that the liquor sold is not shown by the evidence to have been intoxicating liquor, within the rule of this court as laid down in *Klare v. The State*, 43 Ind. 483. In this case, one of the witnesses who drank of the liquor, testified that it was beer, and that it made him drunk. We think this test, in connection with the opinion of the witness, should be regarded as settling the question.

The third assignment of error presents no question for decision.

The judgment is affirmed, with costs.

THE STATE v. LAWRENCE.

LIQUOR LAW.—Justice of the Peace.—A criminal prosecution may be maintained before a justice of the peace for selling intoxicating liquor to a person in the habit of getting intoxicated, in violation of the liquor law of 1873.

From the Hendricks Circuit Court.

C. A. Buskirk, Attorney General, *R. D. Doyle*, and *T. J. Cofer*, Prosecuting Attorney, for the State.

WORDEN, J.—This was a prosecution of the appellee, on affidavit, commenced before a justice of the peace, for selling intoxicating liquor to a person in the habit of getting intoxicated. The defendant was convicted before the justice, and he appealed to the circuit court, where, on his motion, the affidavit was quashed, and the State excepted.

There is no brief on file for the appellee, and we are not advised upon what ground the affidavit was quashed, or wherein it was supposed to be defective. We discover no defect in the affidavit, and think it good. It may have been supposed that a criminal prosecution could not be maintained before a justice

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of the peace for the offence charged. But it has been held that such criminal prosecution may be maintained before a justice of the peace. *O'Connor v. The State*, 45 Ind. 347; *Farrell v. The State*, 45 Ind. 371.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to overrule the motion to quash, and for further proceedings.

NANCE v. ALEXANDER.

LANDLORD AND TENANT.—*Action for Use and Occupation.*—A suit for use and occupation of real estate can only be sustained where the relation of landlord and tenant exists expressly or by implication.

SAME.—Evidence showing that real estate was taken possession of under a claim of purchase at a constable's sale, and by force, will not support an action for use and occupation.

From the Clark Circuit Court.

J. B. Meriwether, for appellant.

PETTIT, C. J.—The appellee sued the appellant, to recover for the use and occupation of a house for two years, demanding judgment for four hundred dollars.

Answer of general denial; trial by the court, finding for the plaintiff, and, over a motion for a new trial, judgment on the finding for two hundred dollars.

The only question in the case is as to the sufficiency of the evidence, under the law, to sustain the finding and judgment. We set out the whole evidence. The plaintiff testified:

"I am the owner of the buildings on lot number 227, in the city of Jeffersonville; the houses are built on leased ground; the ground belongs to Mr. Elliott, and I hold the lease and own the houses; there are three tenements on the lot, all of which belong to me; I owned them on the 27th

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day of November, 1869 ; at that time Mr. Nance and Miller, the constable, took possession of one of my houses on lot number 227, under a pretended constable's sale made by Miller to Nance ; the sale was afterward set aside ; I did not get possession of my house again for one year and eight months ; Mr. Nance occupied the house about two months ; he used it as an auction house ; he and Miller were in partnership in it ; after Nance went out of it, it was vacant for a while, and then Nance sold it to Mr. Bell, and Mr. Bell occupied it for some time, and sold it to Whitlaw, and he sold it to Switzer ; it was one year and eight months from the time Miller and Nance first took possession of my house until I got possession of it again ; I lived in the house adjoining it, and was present when Miller and Nance took possession ; they took it by force ; they forced open the door and went in ; I lived next door and adjoining it all the time, from the time Miller and Nance took it until I got it back again ; I knew when Nance went out of it, and when he sold it to Bell and Bell went in ; after Bell left it, I got possession of it, but Whitlaw had bought it from Bell, and he took it from me by forcing the door open and getting in, and held the possession from me ; the use of the house was worth fifteen dollars per month ; Nance only kept the house two months ; Nance was never a tenant of mine."

Emmons Waldron testified on behalf of plaintiff: "I live in the house described by Robinson Alexander ; have lived in it two months ; I pay fifteen dollars per month rent ; don't know what it was worth in 1869 and 1870 ; I did not live in Jeffersonville then."

This was all the evidence of the plaintiff, and the defendant gave this evidence :

William Nance, the defendant : "I bought the house on lot number 227 at constable's sale ; I occupied it about six weeks, not exceeding two months ; I was put in possession of it by the constable ; after I had been in it about six weeks or two months, I traded it to James W. Bell ; Bell occupied it several months, and sold it to Whitlaw, and afterward Whitlaw sold it to Switzer ; when each one sold it, he gave up the posses-

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sion ; Robinson Alexander lived next door, on the same lot, and knew when I went out of it, and when Bell went into it and out of it ; he was present when I moved out ; the use and occupation of the house was worth about eight dollars per month ; Bell occupied it about six months, and Whitlaw and Switzer the balance of the time."

Simon L. Johnson, testified this: "I reside in Jeffersonville, and know the value of the rent of the house on lot number 227 ; it was worth, at the time spoken of by Alexander, for the twenty months he says he was out of the possession, about ten dollars per month ; that would be a liberal rent for it."

The finding and judgment cannot be sustained on the evidence. A suit for use and occupation can only be sustained where the relation of landlord and tenant exists expressly or by implication. The evidence in this case shows no such state or relation between the parties. *Newby v. Vestal*, 6 Ind. 412 ; *Hanes v. Worthington*, 14 Ind. 320 ; Washb. Real Prop., vol. 1, 512, 513 ; *Wiggin v. Wiggin*, 6 N. H. 298 ; *Ackerman v. Lyman*, 20 Wis. 478.

The judgment is reversed, at the costs of the appellee, with instructions to sustain the motion for a new trial.

VANGORDEN v. THE STATE.

From the Shelby Circuit Court.

K. M. Hord and *A. Blair*, for appellant.

C. A. Buskirk, Attorney General, and *R. D. Doyle*, for the State.

BIDDLE, J.—Prosecution by indictment with two counts, one for giving, and one for selling, intoxicating liquor to

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Franklin P. Conger, a minor. Conviction below, and appeal to this court.

The only question raised is as to the sufficiency of the evidence to support the finding by the court.

The witnesses testified as follows :

Franklin P. Conger : " Know the defendants ; might have seen them on the 15th of July, 1873 ; don't remember ; defendants did not give me anything to drink, that I remember of ; did not give or sell to Dustin Vangorden anything to drink on that day, or any other day, that I know of."

Dustin Vangorden : " Know defendants ; saw them on the 15th day of July, 1873, on public highway, near Norristown, in Shelby county, Indiana ; witness and Franklin P. Conger were in buggy together, going south, and met defendant Vangorden and one Thomas Newton ; they were going north in a buggy ; we met ; defendant Vangorden pulled a bottle out of his pocket and gave some to Franklin P. Conger, but said nothing ; Conger took the bottle, but did not drink, but gave it to me, and I drank ; defendant did not ask me to drink, nor did he say anything at the time ; I think the liquor was blackberry wine and whiskey, mixed, but do not know certain what it was ; I saw defendant Spellman same day, at Joe Mayo's, and he gave me whiskey there ; did not see him on the road with defendant Vangorden, nor did I see defendant Vangorden at Mayo's. All of this was in Shelby county, Indiana."

Defendant Vangorden, being duly sworn, says : " Mr. Newton and myself were in a buggy together, on day referred to, going north, on road near Norristown, and met witnesses Dustin Vangorden and Franklin P. Conger ; gave Conger bottle, which contained nothing but blackberry wine, and asked him to drink ; he took the bottle and gave some to Dustin Vangorden, who drank in my presence, but not by my direction ; I did not ask or invite him to drink, nor did I intend that he should drink out of my bottle ; I handed said bottle out that Conger might drink, and not Vangorden ; the

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bottle contained nothing that would intoxicate, to my certain knowledge."

This was all the evidence given in the case. It is insufficient to support the finding. Besides being weak in several material points, there is none whatever as to the minority of Franklin P. Conger.

The judgment is reversed; cause remanded, with instructions to grant a new trial.

EISENMAN v. THE STATE.

CRIMINAL LAW.—*Appeal from Justice of the Peace.*—*Arraignment.*—Where a defendant in a prosecution commenced before a justice of the peace for selling intoxicating liquor to an intoxicated person had been arraigned upon the affidavit before the justice, and had pleaded not guilty thereto, and had been tried and convicted, upon appeal by him to the circuit court further arraignment and plea were unnecessary.

From the Decatur Circuit Court.

C. Ewing and J. K. Ewing, for appellant.

C. A. Buskirk, Attorney General, *R. D. Doyle*, and *O. B. Scobey*, Prosecuting Attorney, for the State.

WORDEN, J.—This was a prosecution against the appellant before a justice of the peace, for selling intoxicating liquor to a person who was, at the time, in a state of intoxication. Before the justice, the defendant was arraigned upon the affidavit, and pleaded not guilty thereto; and, upon trial, was convicted. He appealed to the circuit court, where, upon trial, he was again convicted.

The only point made by counsel for the appellant is, that in the circuit court he was not arraigned, and did not plead to the affidavit. The record shows that in the latter court the

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defendant appeared in person, as well as by attorney, and that the cause was submitted to the court for trial.

We need not decide what would have been the effect of a failure to formally arraign the defendant and require him to plead, had the prosecution originated in the circuit court. As the prosecution originated before a justice of the peace, and as the defendant was there arraigned and pleaded to the affidavit, any further arraignment and plea were entirely unnecessary.

The defendant was properly tried on the affidavit which was filed before the justice of the peace. *Wachstetter v. The State*, 42 Ind. 166; *O'Connor v. The State*, 45 Ind. 347. On this affidavit he had already been arraigned, and to it he had already pleaded.

The judgment below is affirmed, with costs.

DITTS v. LONSDALE, ADM'R.

EVIDENCE.—Partnership.—In a suit upon a promissory note made in the name of a firm, where the execution of the note is denied, it is competent to show that in other transactions with other parties prior to the making of the note, one of the defendants had acquiesced in the use of his name by the other partner.

PARTNERSHIP.—Promissory Note.—Liability of Partner.—To render one liable as a partner on a promissory note, made by one partner in the firm name, it must appear that it was made in the partnership business, for the purposes of the partnership.

SAME.—Nominal Partners.—Nominal partners are those who appear, or are held out to the world as partners, but who have no real interest in the firm or business.

SAME.—Nominal partners are liable to third persons, notwithstanding they have no real interest in the firm or business.

From the Madison Circuit Court.

Ditts v. Lonsdale, Adm'r.

J. A. Harrison, Sansberry & Goodykoontz, and Robinson & Lovett, for appellant.

R. Lake, for appellee.

DOWNEY, J.—Suit by the appellee, as administrator of the estate of William O'Brien, deceased, against the appellant and one John M. Ditts, on two promissory notes, signed "J. M. & M. P. Ditts." One of the notes was dated April 22d, 1868, and the other October 12th, 1868.

After the commencement of the action, John M. Ditts departed this life; his death was suggested, and the other defendant, Martin P. Ditts, having become his administrator, his name was substituted for that of his intestate, so that he occupied the position of defendant in his own right, and also as administrator of John M. Ditts, deceased. As administrator of the said deceased, he pleaded a general denial and payment; and in his own right he pleaded a general denial, and a second paragraph denying specifically the execution of the note; both of which paragraphs were verified by his oath. Reply in denial of the special paragraphs.

A trial by jury resulted in a verdict for the plaintiff against the defendant personally, and as representative of his intestate. There were also special findings as follows:

1. Did the defendant, Martin P. Ditts, execute the notes in suit?

Answer: He did, by consent.

2. Did Martin P. Ditts authorize the execution of the notes in suit?

Answer: Yes.

3. For what purpose were the notes in suit executed?

Answer: For the use of the firm.

4. What was the consideration of the notes in suit?

Answer: Seven hundred and sixty-three dollars and twenty-two cents.

5. Was the consideration of the notes in suit used in any partnership business of John M. Ditts and Martin P. Ditts?

Answer: No evidence shown for what purpose the money was used.

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Motion for a new trial overruled. and final judgment accordingly.

Martin P. Ditts, in his own right alone, complains of the judgment, he having, as administrator, appeared and declined to join in the appeal. The error assigned by him is the overruling of his motion for a new trial.

The motion of the appellant for a new trial was for the following reasons:

1. Insufficiency of the evidence.
2. Excessive damages.
3. Admitting certain evidence of one Curtis Langley, over the objection of the defendant.
4. Giving instructions one, two, three, four, five, six, and seven.
5. Refusing to give instructions one, two, and three, asked by the defendant.

1. The evidence warranted the jury in finding as they did.
2. The damages are not excessive. This point is not urged by counsel.

3. The evidence of Curtis Langley is brought in question as follows: The plaintiff asked the witness the following question: "State whether or not you have ever held any notes executed in the firm name of J. M. & M. P. Ditts." The appellant objected, on the ground that the evidence sought was irrelevant, and objected to evidence of any statements as to transactions with John M. Ditts occurring long before the making of the notes in suit, in which he did not participate. He also objected to any statements of transactions with him as administrator of John M. Ditts, since his death, as evidence tending to show that he is individually or otherwise liable than as administrator; because such evidence is immaterial and irrelevant to the issues, to prove that he made either of the notes in suit. The court overruled the objection, and the witness gave the following evidence: "I have loaned John M. Ditts money often; the last was in 1870, and after the store was sold out, and he gave me a note for this loan, signed J. M. & M. P. Ditts; John made a payment on this note

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before he died; I bought some goods at the sale of John's property after his death, and Martin, a few days after the sale, made me a payment on the note; it was in 1870 or 1871, that I bought the goods at sale."

On cross-examination, he testified as follows: "The payment Martin made on the note, he made as administrator of John's estate; I gave him a receipt as administrator; I got a horse of Martin, and credited it on the note."

The object of this evidence was to show that in other transactions, with other parties, the appellant had acquiesced in the use made of his name by John M. Ditts. That this instance was prior to the execution of the notes in controversy, does not seem to us to affect the force of the evidence, but rather to strengthen it. As we understand this evidence, the appellant made no objection to this use of his name, and not only made payments on the notes as administrator, but made a payment on it himself by the delivery of a horse to the witness. While this evidence was not very strong, we cannot say that the court committed an error in admitting it for what it was worth.

4. The instructions given were all excepted to by the appellant. They are as follows:

"Gentlemen: This is an action on two notes, brought by Lonsdale, administrator of William O'Brien, deceased, against Martin P. Ditts, administrator of John M. Ditts, deceased, and against Martin P. Ditts, individually. For the deceased, John M. Ditts, the administrator files the general denial, and for himself he files the general denial under oath, and payment for both defendants. Under the general denial filed, and *non est factum*, it is incumbent on the plaintiff to prove by a preponderance of the evidence, the execution of the notes. But the next question, that of payment, it depends on the defendant to prove by a preponderance of the evidence the payments made, or they cannot be allowed. It then becomes important for you to determine whether John M. Ditts executed the notes in suit, and whether Martin P. Ditts executed the notes in suit; and in this connection it is proper for the

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court to say, that in order to the execution of the notes it is not necessary that either John M. or Martin P. Ditts should have actually signed the notes, or either of them. It is sufficient if the party authorize any one to sign his name for him, or acknowledge the notes after his name is signed to them; or if a partner, and one of the partners, in the partnership business, under proper authority, execute the note, it will bind the party.

“2. Then what is the fact in this case? Did John M. Ditts execute these notes sued on, and did Martin P. Ditts (sign) the notes sued on, or authorize his name signed to them, or did he acknowledge the notes after they were executed? If you believe from a preponderance of the evidence that he, John M. Ditts, executed the notes sued on, your finding should be against his administrator in this cause.

“3. And if you believe from a preponderance of the evidence that Martin P. Ditts executed the notes sued on, that is, that he either authorized any one to sign them for him or signed them himself, or acknowledged the notes after they were executed, when talked to about them, or that John M. Ditts was his partner in business, and, under authority in the way of said partnership, signed the notes for himself and Martin P. Ditts, your finding should be against Martin P. Ditts. If, on the other hand, you believe that a preponderance of the evidence fails to show either of the defendants or both of them executed the notes in suit, then you should find for the defendants who failed to execute the notes. You should allow the defendants for all payments that a preponderance of the evidence shows to have been made on the notes.

“4. If, in the case the evidence shows by a preponderance thereof that John M. Ditts signed his own name and the name of Martin P. Ditts to the notes sued on, in that instance it becomes important for you to determine whether Martin P. Ditts has done anything to bind himself by the signature or is bound by it; and if you find that Martin P. Ditts and John M. Ditts were in partnership, or that Martin P. Ditts, not being a partner, permitted his name used and held out to the public

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as a partner, and the note sued on was given in the partnership business; or if he was or was not a partner, and yet, after his name was written to the note, he acknowledged the same or promised to pay the same, then the plaintiff should recover; but, if you find that the notes were not given in a partnership transaction, or that Martin P. Ditts never authorized his name signed to the notes, or that he never acknowledged the notes after their execution, then your finding should be for Martin P. Ditts."

The sixth and seventh instructions relate to the form of the verdict. There is no fifth in the record.

We go to the brief of counsel for objections to the instructions. The first objection, as we understand the counsel, is, that in the second and third, the court, in effect, told the jury that if the defendants John M. and Martin P. Ditts were partners, and the firm name was signed by John M., this would render Martin P. liable, whether the notes were made within the scope of the partnership or not.

In the second charge the court does not lay down any rule with reference to the liability of Martin P. Ditts personally. The court propounds a question with reference to the liability of both John M. and Martin P., but in that charge lays down a rule as to John M. only.

In the third charge the court gives the rule as to the liability of Martin P. The court tells the jury, in that charge, when he would be liable. If he executed the notes, 1. By authorizing some one to sign the notes for him. 2. By signing them himself. 3. By acknowledging the notes after they were executed when talked to about them. 4. If John M. was his partner in business, and, under authority in the way of said partnership, signed the notes for himself and Martin P. Ditts. In any of these cases, the jury were told they must find for the plaintiff against Martin P. Ditts.

With reference to the objections which we are now considering, we do not think the charges in question are objectionable. It is stated in the third instruction, that to render Martin P. Ditts liable on the ground that he was a partner of John

M., the notes must have been executed by John M. "under authority, in the way of said partnership." By this, we think, should be understood that the notes were made in the partnership business and for the purposes of the partnership.

It is further objected to these same instructions, that they improperly informed the jury that if the notes were signed without any authority whatever, and Martin P. Ditts afterwards acknowledged the notes when talked to about them, he would be liable. This part of the instruction assumes that the defendant Martin P. Ditts did not sign the notes himself, did not authorize any person to sign them for him, and was not a partner of John M. Ditts; but, after the notes were executed, he "acknowledged" them. If the case turned upon this part of the instruction, we should hesitate to affirm the judgment, but we think it does not. The jury do not appear to have put the case on the ground of ratification, but on the ground of an original authority, and on this ground, we think, the evidence justified the verdict.

- In their answer to the second interrogatory, the jury find that Martin P. Ditts authorized the execution of the notes. It is not clear that Martin P. Ditts participated in the profits of the business; but it is clear that his name was used in the business as a partner, and was on the sign over the door as such, with his full knowledge and consent, prior to the time when these notes were executed, and no notice of any change or dissolution appears. Under these circumstances, when the case does not seem to have gone to the jury or been considered by them on the ground of ratification, we ought not to disturb the judgment, even if the part of the instruction in question was not strictly correct.

It is urged that the fourth instruction is incorrect, for the same reason as the second and third. We think, however, that, viewed with reference to the evidence and the findings of the jury, it is not so erroneous as to require a reversal of the judgment.

The next and last question is as to the refusal to give

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instructions one, two, and three, asked by the defendant Martin P. Ditts. These instructions are as follows:

“ 1. This is an action brought by the plaintiff as administrator of the estate of William O'Brien, against the defendant, Martin P. Ditts, in person and as administrator of the estate of John M. Ditts, deceased, upon two promissory notes alleged to have been executed by John M. Ditts, in his lifetime, and Martin P. Ditts, by the firm name of J. M. & M. P. Ditts; and to the action on said notes the defendant Martin P. Ditts has pleaded the plea of *non est factum*, that is, that he never executed the notes, or authorized any one to execute them for him, and that he never ratified the same after their execution. Now, under the issues thus formed, in order for the plaintiff to recover against the defendant Martin P. Ditts, he must prove by a preponderance of the testimony that the defendant did execute, or authorize the execution of said notes by some one else, or that he ratified and assented to their execution by some other person after their execution, or that the said John M. and Martin P. Ditts were partners in business of some kind, and that the notes in suit were executed by one of the firm in the firm name of such partnership and for the legitimate and proper purposes of such partnership business; that is, they must be directly connected with the business of such partnership; and if you find, from a preponderance of the evidence, the said facts, then you should find for the plaintiff and against the defendant Martin P. Ditts; otherwise, you should find for said defendant Martin P. Ditts, in person, but against him as administrator of the estate of John M. Ditts.

“ 2. When two or more persons are engaged in business as partners, any one member of said firm can execute a note by the firm name of such partnership; and it becomes binding on all the members of such firm, if it is given for or in consideration of the firm or partnership business, but not otherwise; and if you find from the evidence that John M. Ditts and Martin P. Ditts were in partnership in business of any kind, and that John M. Ditts executed said notes, or either of them, and signed the firm name thereto, and that they were so given

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for the individual benefit of said John M. Ditts, and not for the benefit of the firm or partnership, then in that event Martin P. Ditts would not be bound, and your finding should be for him in person in this action, but against him as administrator of the estate of John M. Ditts.

“ 3. If you find, by a preponderance of the evidence, that the said John M. Ditts and Martin P. Ditts were not partners in business, and that John M. Ditts signed said notes in a firm style or form, embracing the name of Martin P. Ditts, then, and in that event, unless you further find that Martin P. Ditts authorized the same to be done, or that he confirmed and approved the same afterward, your finding should be for the defendant, Martin P. Ditts, individually, but against him as administrator, as before stated ; otherwise you should find for the plaintiff against the defendant, generally.”

It happens in this case, as it often does in others, that the court gives a series of instructions, and is then called upon to give another series differing in some respects from the former, but like it in many others. We are then required, by an exception to the instructions given, and to the refusal to give others, to examine both sets and determine whether any of the propositions of law contained in the instructions refused are not covered by the instructions given, and if so whether they should or should not have been given to the jury. So far as the instructions asked are merely a repetition of those already given, it was unnecessary that they should have been given.

After a careful comparison and consideration of the instructions, we are of the opinion that the court did not commit any error in refusing to give the instructions asked by the defendants. Partners are ordinarily divided into, 1. Ostensible partners, or those whose names are made known and appear to the world as partners, and who in reality are such. 2. Nominal partners, or those who appear or are held out to the world as partners, but who have no real interest in the firm or business. 3. Dormant partners, or those whose names are not known, or do not appear as partners, but who, neverthe-

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less, are silent partners, and partake of the profits, and thereby become partners, either absolutely to all intents and purposes or, at all events, in respect to third persons. Story Partnership, sec. 80.

Nominal partners are liable to third persons, notwithstanding they have no real interest in the firm or business. Story Partnership, sec. 64.

The instructions asked did not present this view of the case to the jury, although the case, as presented by the evidence, justified the jury in so regarding it. This view was presented, however, in the fourth instruction given by the court.

We think there is no available error in the record.

The judgment is affirmed, with costs.

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49	530
152	457
153	549

MORTGAGE.—*Partnership Property Mortgaged by One Partner for Individual Debt.*—*Cross Complaint.*—In a suit to foreclose a mortgage on partnership real estate, made by one partner to secure his individual debt, creditors of the firm may be admitted as parties, and may file their cross complaint to subject the mortgaged real estate to the payment of the partnership debts, before payment of the mortgage debt; and they may do this whether the firm debts were contracted before or after the execution of the mortgage.

SAME.—Where real estate held by the members of a partnership as partnership property is mortgaged by one of the partners to secure his individual debt, the mortgagee only acquires a lien upon what may be the share of the mortgagor after settlement of the partnership accounts and the payment of all partnership debts.

SAME.—The creditors of an insolvent partnership are entitled to have the partnership assets applied in satisfaction of their debts, in preference to the creditors of the individual partners, and this without regard to whether the partnership debts were contracted before or after the individual debts.

From the Kosciusko Common Pleas.

Conant v. Frary et al.

E. Haymond and W. S. Marshall, for appellant.

H. S. Briggs and C. Clemans, for appellees.

WORDEN, J.—The appellant filed his complaint in the court below against Franklin G. Frary and his wife, to foreclose two mortgages executed by them to one Justus Frary, and assigned by the latter to Conant, on the undivided half of certain real estate therein described. The mortgages were executed to secure the payment of certain promissory notes given by Franklin G. to Justus Frary, and endorsed by the latter to Conant. One of the mortgages bore date November 5th, 1866, and the other February 5th, 1868.

Franklin G. and his wife made default; but J. William Jones and others, appellees herein, on their application, were made parties, and filed what was called an answer, which, from its character, we think may be regarded as a cross complaint. It is alleged, in substance, that the property mortgaged was partnership property, belonging, at the time of the execution of the mortgages, to the partnership firm of Frary & Murrays, consisting of said Franklin G. Frary, Michael Murray, and William Murray; that the cross complainants were creditors of said firm, but when their respective debts accrued, whether before or after the execution of the mortgages, is not directly stated. It alleges that the business of the firm, woolen goods manufacturing, was carried on by the firm upon the mortgaged premises until March 20th, 1871; and in the meantime partnership debts were contracted; that Frary, the mortgagor, and the Murrays are insolvent, and that there is no other property out of which any part of the partnership debts can be realized; that the mortgages were executed to secure the payment of the private and individual debts of said Franklin G. Frary, and that they were made without the knowledge or consent of the Murrays. The cross complainants prayed for the appointment of a receiver, that the whole of the property be sold, and that they have priority in the payment of their debts over the plaintiff as the holder of the mortgage.

Conant demurred to the cross complaint for want of sufficient facts, but the demurrer was overruled, and exception

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taken. Further pleadings were filed, but as no point is made upon them in the brief of counsel for the appellant, they need not be specially noticed.

The cause, upon the issues made up, was tried by the court, who found for the cross complainants. The appellants moved for a new trial, but the motion was denied. Exception.

Judgment was rendered to the effect that the plaintiff, Conant, recover from Franklin G. Frary the amount due on the notes; that a receiver, who was appointed by the court, sell the whole of the property, and that out of the proceeds the costs be first paid, and secondly the partnership debts, and that one-half of the residue, if any, be paid to the appellant on said judgment against said Franklin G. Frary. There was no objection below, either to the form or substance of the judgment as rendered.

We proceed to consider the grounds upon which it is claimed, in the brief of counsel for the appellant, that the judgment should be reversed.

It is claimed by the appellant that the court erred in permitting the cross complainants to be made parties. It is argued that, as they were not necessary parties to the original action as defendants, they could not make themselves such over the objection of the plaintiff. We do not regard the cross complainants as defendants to the original action, but as plaintiffs in the cross action. Their cross complaint is called an answer, but it sets up new facts, not in bar of the original complaint, but as ground for relief, and contains a proper prayer for relief. It has all the essentials of a cross complaint, and should be regarded as such. *Campbell v. Routt*, 42 Ind. 410. We think it was entirely proper to permit the cross complainants to file their cross complaint. It is urged that, as all the proper parties to the cross complaint were not before the court, viz., the alleged partners, the court could not settle the questions arising thereon. This objection was not made by the demurrer, or in any other manner in the court below. It cannot be made successfully, for the first time, in this court.

We come now to the principal point on which it is claimed

that error was committed. It is not shown in the cross complaint, or otherwise, that the debts due from the firm to the several cross complainants existed at the time of the execution of the mortgages. The inference, we think, is that most of the debts accrued after the execution of the first mortgage, and probably some of them after the execution of the second. And it is insisted by the appellant that the creditors of the firm, whose debts did not exist at the time the mortgages were executed respectively, cannot have preference or priority over the mortgage thus given, when the particular debts had not been contracted; in other words, that the mortgagee acquired a lien on the property, which he could enforce to the exclusion of partnership creditors, becoming such after the mortgages respectively were executed.

It is clear that Franklin G. Frary, to secure his individual debt, could mortgage the partnership property only to the extent of his interest therein. "No partner has an exclusive right to any part of the joint stock, until a balance of accounts has been struck between him and his co-partners, and the amount of his interest accurately ascertained. The interest of each partner in the partnership property is his share in the surplus, after the partnership accounts are settled and all just claims satisfied." 3 Kent Com. 37. See, also, *Menagh v. Whitwell*, 52 N. Y. 146; *Smith v. Evans*, 37 Ind. 526.

From this principle it would seem to follow that the lien acquired by the mortgagee was only a lien upon what might be the share of Franklin G. Frary after the settlement of the partnership accounts and the payment of all partnership debts. Then, it is a well established general principle of equity, that the creditors of an insolvent partnership are entitled to have the partnership assets applied in satisfaction of their debts, in preference to the creditors of the individual partners. We need not stop to inquire whether this equitable right of the partnership creditors is to be worked out through the equities of the partners or otherwise. The principle is thoroughly established. *Menagh v. Whitwell*, *supra*; *Washburn v. Bank of Bellows Falls*, 19 Ver. 278; *Lovejoy v. Bowers*, 11 N.

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H. 404; 1 Tudor Lead. Cas. 552; *Matlock v. Matlock*, 5 Ind. 403; *Weyer v. Thornburgh*, 15 Ind. 124.

It would seem to follow from the proposition, that the mortgagee acquired no lien except upon the share that might be due to the mortgagor after the settlement of partnership accounts and the payment of the partnership debts, that the partnership debts must all be paid before such share can be ascertained and determined, and hence, that debts accruing after the execution of the mortgages must be first paid, as well as those which accrued before the mortgages were given.

No case has been cited by counsel, and in our own researches we have found none, which holds that debts thus subsequently contracted stand upon ground in anywise different from that occupied by previous ones.

The case of *Lovejoy v. Bowers, supra*, holds that there is no such distinction. There, a partner had executed a mortgage, to secure his own indebtedness, on the partnership effects. The mortgagee had permitted the property to be used in the partnership business, as in this case, after the execution of the mortgage. Partnership debts were contracted both before and after the execution of the mortgage, and the question arose whether these creditors were entitled to priority of payment out of the partnership effects. Counsel urged, as in this case, that the subsequent creditors were not entitled to such priority. But the court said: "The distinction between prior and subsequent creditors, taken in the argument, cannot be supported." The court added: "Considered as a mortgage of the interest of one partner in the partnership property, and admitting that such mortgage might be valid as between the parties, the mortgagee having permitted the mortgagor to continue the business, could only be entitled to such surplus as might remain after the payment of the partnership debts, whether contracted before or after the execution of the mortgage. He could stand in no better situation than the mortgagor in this respect."

From these considerations we are of opinion that the cross-complainants, as creditors of the firm, are entitled to priority

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of payment, whether their claims accrued before or after the execution of the mortgages in question.

What we have said disposes of all the grounds upon which a reversal is claimed. We find no error in the record.

The judgment below is affirmed, with costs.

COMBS v. ETTER.

DRAINING ASSOCIATION.—Pleading.—Complaint to Recover Assessment.—A complaint to recover an assessment against lands, for the construction of a ditch, under the act of March 11th, 1867 (3 Ind. Stat. 228), must show a substantial compliance with all the requirements of the statute; and the sufficiency of the complaint cannot be determined by looking to the petition filed with the complaint.

SAME.—Such complaint must show that the appraisers were residents of the county, and not of kin to any of the parties.

From the Johnson Common Pleas.

G. M. Overstreet and *A. B. Hunter*, for appellant.

T. W. Woollen and *C. Byfield*, for appellee.

DOWNEY, J.—This was an action to recover the amount assessed against lands of the appellant to construct a ditch, under the act of March 11th. 1867, Acts Regular Session, p. 186. 3 Ind. Stat. 228.

The complaint states, that in June, 1869, the plaintiff filed his petition to the board of commissioners of the county, stating, among other things, his desire to drain and reclaim certain lands owned by him in the county of Johnson, etc., which are described, by constructing a certain ditch, a description of which is given, to be four feet in width at the top, two feet wide at the bottom, and with a fall of one inch to three rods; which ditch, it is alleged, could not be constructed and said land be drained without affecting other lands in said county, a description of which is given, owned by the defendant and

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others ; that at said term of the board of commissioners, the board appointed three persons, named, disinterested freeholders, not of kin to the petitioner, appraisers, to assess the benefits and damages to the lands described by reason of the construction of said ditch ; that on the 24th day of June, 1869, the plaintiff handed to said appraisers a transcript of the proceedings in said court on said petition, and, in July, 1869, he served a written notice on each of the persons above named, whose lands would be affected by the construction of said ditch, by reading, including the defendant herein, notifying said persons, including the defendant, that said appraisers would meet on the 14th day of August, 1869, at eight o'clock A. M., at the beginning of said ditch ; that said notice was served upon said persons, including defendant, more than ten days before the time of meeting of said assessors ; and plaintiff avers, that on the 23d day of November, 1869, he filed said written notice, with his affidavit attached thereto, that the same had been so served by him, in the auditor's office of said county. The complaint then says : " Copies of which petition, transcript, and notice and affidavit are filed herewith, and made part hereof."

And the plaintiff further avers, that on the 14th day of August, 1869, said appraisers met at the beginning of said described ditch, at eight o'clock, A. M., of said day, and proceeded to and did view all the lands liable to be affected in any way by the construction of said ditch, and made out according to law a schedule and assessment of lands benefited by the construction of said ditch, and filed the same in the recorder's office of said county on the 14th day of August, 1869, a copy of which assessment, it is alleged, is filed with the complaint ; that said appraisers, in said assessment, assessed as benefits, by the construction of said ditch, the sum of twenty-one dollars and twenty-five cents to the south-east quarter of the north-east quarter of section 35, and forty dollars to the west half of north-west quarter section 35, all in township 13, range 3 east, in said county, owned by defendant.

It is further alleged, that, in pursuance of his said petition,

in 1869, he did complete the construction of said ditch, as described in said petition, and in 1869 said defendant paid part of the amount assessed against said west half south-west quarter, and after the completion of said ditch, in 1869, he demanded of said defendant the payment of the remainder; that the defendant refused, and still refuses to pay the same; that the same was due to him from the defendant in 1869, and still remains due and unpaid; wherefore he demands judgment for fifty dollars, that the same be decreed a lien on said lands, that the same be sold, etc.

The first question raised by the assignment of errors is upon the sufficiency of the complaint. In deciding upon the sufficiency of the complaint, we cannot look to the petition filed with it, but must look to the averments contained in the pleading itself. *Knight v. The Flat Rock, etc., Co.*, 45 Ind. 134.

The first ground of objection to the complaint is, that the petition did not state that the lands to be drained are in the county where the proceeding was commenced. We cannot look to the petition. The complaint avers that the petition did so state. This must be taken as true on demurrer.

The second ground of objection is, that it does not appear that the appraisers were residents of the county; that it states they were "disinterested freeholders, not of kin to the petitioner," but does not state that they were residents of the county. This is true.

The first section of the act requires that the appraisers shall be "disinterested freeholders of the county in which the application is made, and not of kin to any of the parties." The complaint also fails to allege that the assessors were not of kin to any of the parties, but only states that they were not of kin to the petitioner. In a proceeding like this, the complaint should show a substantial compliance with all the statutory requirements.

Other objections are made to the complaint. As to them it can be amended, if necessary. For the reasons already stated, it must be held bad.

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The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the complaint.

CRONE v. THE STATE.

LIQUOR LAW.—Indictment.—An indictment under the act of February 27th, 1873, to regulate the sale of intoxicating liquors (Acts 1873, p. 151), alleging that the sale was made after the hour of nine o'clock P. M., need not aver that the defendant had a permit. Having a permit is no part of the offence, or description of the offence.

SAME.—Statute Construed.—Section 10 of said act creates no offence independent of that defined in section 1, and the two sections must be construed together.

From the Marion Criminal Circuit Court.

W. W. Leathers, for appellant.

C. A. Buskirk, Attorney General, *R. P. Parker*, Prosecuting Attorney, and *J. M. Cropsey*, Prosecuting Attorney, for the State.

BIDDLE, J.—The appellant was indicted for violating the "act to regulate the sale of intoxicating liquors," etc., approved February 27th, 1873. Acts 1873, p. 151.

Section 1 enacts, "that it shall be unlawful for any person or persons, by himself or agent, to sell, barter, or give away for any purpose of gain, to any person whomsoever, any intoxicating liquors to be drunk in, upon, or about the building or premises where the liquor is sold, bartered, or given away, or in any room, building, or premises adjoining to or connected with the place where the liquor is sold, bartered, or given away for the purpose of gain, until such person or persons shall have obtained a permit therefor from the board of commissioners of the county where he resides, as hereinafter provided."

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Section 10 enacts, that "a permit granted under this act shall not authorize the person so receiving it to sell intoxicating liquors on Sunday, nor upon the day of any state, county, township, or municipal election in the township, town, or city where the same may be held, nor upon Christmas day, nor upon the 4th of July, nor any Thanksgiving day, nor upon any public holiday, nor between 9 o'clock P. M. and 6 o'clock A. M.; and any and all sales made on any such day, or after 9 o'clock on any evening, are hereby declared to be unlawful, and upon conviction thereof the person so selling shall be fined not less than five dollars nor more than twenty-five dollars for each sale made in violation of this section."

Section 14 enacts the penalty incurred under section 1, which is "a fine of not less than ten dollars nor more than fifty dollars, or be imprisoned in the jail of the county not less than ten nor more than thirty days."

There is no other portion of the act which particularly affects the question before us.

Besides the formal parts of the indictment, the material charge in it is, that Jacob Crone on, etc., at, etc., did unlawfully sell to Allen Short, for the purpose of gain, two gills of intoxicating liquor, at and for the price of ten cents, and did then and there suffer and permit the said liquor to be drunk in the building and upon the premises where the same was sold, the said liquor being then and there sold as aforesaid by him, the said Jacob Crone, after the hour of nine o'clock in the evening, and after the hour of nine o'clock P. M. of said day, contrary, etc.

There was a motion to quash the indictment overruled, plea of not guilty, trial by jury, conviction, fine ten dollars, motion for a new trial overruled, exception, judgment, and appeal.

The errors assigned are :

1. Overruling the motion to quash the indictment.
2. Overruling the motion for a new trial.

It is urged in support of the first error, that the indictment is founded on section 10, and therefore should aver that the appellant had a permit; that without such averment it could

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not be ascertained, upon conviction, whether the appellant had incurred the penalty under section 10 or that under section 1; and that the record could not be pleaded in bar of a subsequent prosecution for the same offence.

We are of opinion that the indictment does not rest solely on section 10. This section creates no offence independent of that defined in section 1. The two sections must be construed together. A permit authorizes the sales described in section 1 on all days and in every hour of the day; section 10 limits the permit, so that it shall not authorize such sales on certain days therein excepted, nor within certain hours of the day. The sales prohibited by section 10 must be construed to mean such sales as are described in section 1, otherwise no commercial sale of intoxicating liquors, or for medical, chemical, or mechanical purposes, or for the use of the arts and sciences, could be made on the prohibited days, nor within the interdicted hours, nor after nine o'clock on any evening in any other day in the year. It is easy to see that this was not the intention of the legislature, for we cannot suppose that they would have prohibited, in terms, such sales on certain days in the year, and within certain hours in the night time, as mentioned in section 10, and leave such sales unprohibited on all other days and within the usual business hours throughout the remainder of the year. The act nowhere makes the mere sale of intoxicating liquors an offence. To be a subject of prosecution, the sale must be of a particular character, as a sale of the liquor to be drunk on the premises, to a minor, a person intoxicated, etc., and must be made an offence in terms by the act. A punishable offence must be clearly defined by statute; it cannot be created by construction.

It is also insisted upon that the indictment is invalid for want of an averment that the appellant had a permit. Having a permit is no part of the offence, nor description of the offence. If such an averment was made, it would not require proof, nor would it impose more, or excuse less evidence on the trial. It would not in any way change the legal effect of the indictment. But it is said that such an averment was

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necessary for the purpose of ascertaining what penalty would be incurred under the indictment in case of a conviction. We see no difficulty here. The penalty prescribed under section 1 is not applicable to this indictment, because it does not allege that the sale was made without a permit; and the penalty prescribed in section 10 is applicable to this indictment, because it alleges the sale to have been made within the prohibited hours, which is not a violation of any other section in the act. Besides, the penalty incurred under an indictment is matter of law, and not of fact, which must be averred and proved. In support of these views, see *Lehritter v. The State*, 42 Ind. 383; *Lehritter v. The State*, 42 Ind. 482; *Landaner v. The State*, 42 Ind. 483; *Hulsman v. The State*, 42 Ind. 500; *Groesch v. The State*, 42 Ind. 547; *Ginz v. The State*, 44 Ind. 218; *Beardsley v. The State*, ante, p. 240.

As to the second error, we have read the evidence carefully, and are of the opinion that it would convince a fair-minded jury, beyond a reasonable doubt, that the defendant committed the offence charged against him in the indictment. In the case cited by the appellant, *Anderson v. The State*, 39 Ind. 553, "the evidence did not show that the person who sold the liquor was the agent of Anderson, or employed by him, or that Anderson had any knowledge of the sale." In this case, although the sale was made by a barkeeper, the evidence tends so strongly to show that the appellant had full knowledge of the transaction, and assented thereto, that a doubt of these facts would be light and frivolous.

The judgment is affirmed.

DOWNEY and BUSKIRK, JJ.—We concur in the judgment of affirmance in this case, but not in all the views expressed by our brother BIDDLE in his opinion. We have already, in several cases, stated our views as to the proper construction of section 10 of the act, and do not deem it necessary to repeat them here.

WORDEN, J.—The majority of the court not being entirely

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harmonious in opinion as to the ground on which they conclude the judgment below should be affirmed, and not coming to that conclusion myself, I deem it proper to state the grounds of my dissent.

Passing by any other objections, the indictment, I think, is fatally defective in not alleging whether the defendant had or had not a permit to sell intoxicating liquors.

The indictment, I think, must be regarded as based upon either the first or the tenth section of the statute, and not upon both of them combined, inasmuch as the penalties prescribed for the violation of each are different.

The first section of the act makes it unlawful to sell any intoxicating liquors to be drunk on or about the premises where sold, without having obtained a permit, as provided for. The penalty prescribed for a violation of this section is a fine of not less than ten nor more than fifty dollars, or imprisonment for not less than ten nor more than thirty days.

The tenth section provides, that a permit granted under the act shall not authorize the person receiving it to sell intoxicating liquors (amongst other times), between nine o'clock P. M. and six o'clock A. M., and declares all sales in contravention of that section unlawful. The penalty prescribed for a violation of the tenth section is a fine of not less than five, nor more than twenty-five dollars.

Thus, it is seen that for selling without a permit a party is subjected to a fine ranging from ten to fifty dollars, or imprisonment; while, for selling with a permit, but at the interdicted times, he is only subjected to a fine ranging from five to twenty-five dollars, but not imprisonment.

As the offences defined in the two sections are different, and the penalties prescribed for their violation different, the indictment ought to be so certain as to show on its face which one of the sections has been violated, and, therefore, what penalty has been incurred.

It is conceded, in the opinion of the majority of the court, that the penalty prescribed for the violation of the first sec-

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tion is not applicable to the case made, because the indictment does not allege that the sale was made without a permit. But the court hold that the penalty prescribed for a violation of the tenth section is applicable. The courtsay, "Having a permit is no part of the offence nor description of the offence." I think differently. If the having a permit is not a part and descriptive of the offence defined by the tenth section, then a person is subjected to a less penalty for selling without a permit, after nine o'clock at night, or at the other times interdicted by that section, than he is for selling *generally* without a permit.

If the sale was made without a permit, the first section of the statute was violated, and the higher penalty incurred. If it was made with a permit, the tenth section, was violated, and the less penalty was incurred.

I see no reason for saying that the tenth section of the statute was violated, rather than the first.

The pleader, doubtless, by alleging the sale to have been made after nine o'clock at night, intended to frame his indictment upon the tenth section. But the facts charged, as has already been stated, are a violation of the first section, if the defendant had no permit. If he had a permit, they are a violation of the tenth section. One or the other of these sections was violated, but the indictment does not show which; and for that reason it is, in my opinion, fatally defective. *Commonwealth v. Macuboy*, 3 Dana, 70.

Upon a plea of guilty to this indictment, or upon conviction, the court cannot know judicially whether the defendant had or had not a permit; and therefore cannot know whether to inflict the penalty prescribed for a violation of the first, or that prescribed for a violation of the tenth section.

I close this opinion with an extract from Bishop Crim. Proced. vol. 1, sec. 506:

"The charge must contain such a description of the crime, that the defendant may know what crime he is called upon to answer; that the jury may appear to be warranted in their conclusion of guilty, or not guilty, upon the premises delivered to them; and that the court may see such

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a definite crime that they may apply the punishment which the law prescribes.”

Sec. 539. “Moreover, the public safety requires that whatever is to guide the court in pronouncing the judgment of the law shall distinctly appear in allegation. If it does not, no decision can be a precedent for another, and the law will cease to be a system of known authority, but the prejudices of the particular men who hold the office of judge, and not established rule, will determine the destinies of those who are accused of crime. Out of a beginning like this may even flow the swollen stream of a despotism which will sweep away all law.”

For these reasons, I am of opinion that the motion to quash, which was made in the court below, should have been sustained.

PETTTT, C. J.—I concur in the above opinion of Judge WORDEN.

BAUMER v. THE STATE.

CRIMINAL LAW.—Incest.—Step-Mother and Step-Son.—Under the statute, 2 G. & H. 452, sec. 45, to constitute the crime of incest from sexual intercourse between a step-mother and her step-son, they must each have had knowledge of their relationship, and the indictment must show such knowledge.

SAME.—The crime in such case is a joint one, and must be so charged, and one of the parties cannot be legally guilty unless the other is also guilty. They may be tried separately, and one may be convicted and sentenced before the other is tried. If one is acquitted, the other must be discharged, and the acquittal of one may be pleaded in bar of a prosecution against the other.

.From the Wayne Circuit Court.

Baumer v. The State.

A. B. Young, for appellant.

C. A. Buskirk, Attorney General, for the State.

DOWNEY, J.—This was a prosecution against the appellant for incest. The charge in the indictment is as follows:

“The grand jurors for said State of Indiana impanelled, charged and sworn in the Wayne Circuit Court to inquire within and for the body of the same said county of Wayne, upon their oath charge and present that Arthur Baumer, late of said county, at said county, on the 30th day of May, A. D. 1874, did then and there unlawfully have sexual intercourse with his step-mother, Augusta Baumer, then and there knowing the said Augusta Baumer to be his step-mother, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.”

The defendant moved the court to quash the indictment, but his motion was overruled, and he excepted. He then pleaded a special plea in bar, in which he alleged, “that the said grand jury, which found and returned the indictment, at the November term, 1874, of the said court, also found and returned at the same time into said court as a true bill and indictment against Augusta Baumer, charging that she, the said Augusta, on the — day of May, 1874, at said county, did unlawfully have sexual intercourse with her step-son Arthur Baumer (this defendant meaning), she, the said Augusta, then and there knowing that he, the said Arthur, was her step-son, which said Augusta Baumer so charged is the same Augusta Baumer named in the said indictment against this defendant, and the said Arthur Baumer named in the said indictment against the said Augusta was and is this defendant, and the act of sexual intercourse therein charged was the same act of sexual intercourse charged in said indictment against this defendant, and none other, and the offences charged in the said two indictments so found and returned by the said grand jury were and are the same to all intents and purposes; and afterward, to wit, at the said November term of said court, the said Augusta

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Baumer, being arraigned in said court upon the said indictment found and returned against her as aforesaid, pleaded not guilty thereto, and the issue being joined in said cause between the State of Indiana and the said Augusta, the same came on for trial in said court and was there tried by a jury duly empanelled in said court, and on said trial it was proved by competent evidence and beyond a reasonable doubt that the said Augusta, at the time of the said alleged sexual intercourse, had knowledge of the relationship existing between her and the said defendant; that she was at said time the step-mother of the said defendant, and he was her step-son; and there was no evidence given on said trial proving or tending to prove that the said Augusta was, at the time of the said alleged intercourse, or at any other time insane, or of unsound mind, or incapable of understanding the criminal nature of said alleged act; and the said jury, having heard the evidence in the cause, and after due deliberation thereon, found and returned into said court their verdict in the words following, to wit: 'We the jury find the defendant not guilty;' and thereupon the said Augusta was discharged from said indictment, and the said prosecution against her was fully ended; wherefore the said defendant says that the State of Indiana ought not further to prosecute the said indictment against him, and he prays that he may be discharged therefrom."

The State demurred to this answer, the demurrer was sustained, and the defendant excepted. The prisoner then pleaded not guilty, the cause was tried by a jury, there was a verdict of guilty, with punishment of nine months' imprisonment in the county jail. Judgment was rendered accordingly.

The errors assigned bring in question the action of the court in overruling the motion to quash the indictment, and in sustaining the demurrer to the answer.

The statute on which the indictment is founded reads as follows:

"If any step-father shall have sexual intercourse with his step-daughter, knowing her to be such, or if any step-mother and her step-son shall have sexual intercourse together, having

knowledge of their relationship, or if any parent shall have sexual intercourse with his or her child, knowing him or her to be such, or if any brother and sister, being of the age of sixteen or upwards, shall have sexual intercourse together, having knowledge of their consanguinity, every person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be imprisoned in the state prison not less than two nor more than ten years, or may be imprisoned in the county jail not less than six nor more than twelve months." 2 G. & H. 452, sec. 45.

The section may be analyzed to advantage.

1. It declares, that "if any step-father shall have sexual intercourse with his step-daughter, knowing her to be such," he shall be guilty. Here the step-daughter is not legally guilty of any crime. The step-father is guilty, if he have knowledge that she is his step-daughter, and this is so whether she has knowledge that he is her step-father or not. The crime is separate and several on his part.

2. "If any step-mother and her step-son shall have sexual intercourse together, having knowledge of their relationship." This language, it will be perceived, is quite different from the preceding. It is required that they shall have sexual intercourse together, and that they shall both have knowledge of their relationship. In this case both parties to the act become guilty, and liable to punishment. The crime is a joint one, and one of the parties cannot be guilty unless the other also is guilty.

3. "If any parent shall have sexual intercourse with his or her child, knowing him or her to be such." In this case, the parent is the only party made criminally responsible. The crime is the separate and several crime of the parent, while the child is not punishable at all. Applied to persons sustaining this relation to each other, the law is like it is with reference to the relation of step-father and step-daughter.

4. "If any brother and sister, being of the age of sixteen or upwards, shall have sexual intercourse together, having knowledge of their consanguinity." Here, as under the sec-

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ond clause of the statute, the crime is joint. The parties must have intercourse together, with knowledge of their consanguinity.

The indictment in this case is on the second clause of the statute, and consequently we need only decide upon the proper construction of that part of the section. That its proper construction is that which we have already indicated, we think is reasonably clear, upon the language of the statute itself.

We are referred by counsel for appellant to, and cite in support of this construction of the statute, the following authorities: Bishop Stat. Crimes, secs. 731, 721, and 702; *The State v. Byron*, 20 Mo. 210; *Noble v. The State*, 22 Ohio St. 541; *Delany v. The People*, 10 Mich. 241. In the last named case the information was on a statute, the language of which, so far as it affected the case in judgment, was as follows: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate and cohabit together, * * every such person shall be punished," etc. It was held, that the offence was joint, and that both of the parties must be guilty, or neither.

The indictment in the case which we are considering alleges only that the defendant "did unlawfully have sexual intercourse with his step-mother, Augusta Baumer, then and there knowing the said Augusta Baumer to be his step-mother." Such an allegation of the crime might have been good, according to our view of the statute, had the indictment been against a step-father, or a parent, where the guilty participation of the other party to the act is not a necessary ingredient of the crime. But, as between step-mother and step-son, where the crime is joint, and where both must be guilty, or neither, we think it is fatally defective.

It follows, from what has already been said, that the court erred in sustaining the demurrer to the answer of the defendant, setting up the acquittal of Augusta Baumer, the step-mother, and other party to the alleged joint crime.

In addition to the above cited authorities, we may, on this point, refer to the following: *State v. Tom*, 2 Dev. 569;

Jones v. The State.

The King v. The Inhabitants, etc., 13 East, 411; *Turpin v. The State*, 4 Blackf. 72.

In the last named case, which was a prosecution for riot against three persons, upon the trial two were acquitted, and one found guilty. It was held, that upon this verdict no judgment could be pronounced against the defendant found guilty.

In the case of *Delany v. The People, supra*, it was held, that the parties must both be joined as defendants in the same information, but we do not care to lay this down as law.

Whether they be prosecuted in the same indictment or not, the crime must be charged as a joint crime. They may be tried separately, and one may be convicted and sentenced before the other is tried. If one be tried and acquitted, the other must be discharged; and, it is said, in the Michigan case, that if one be tried, convicted, and sentenced, and the other tried and acquitted, this will, *ipso facto*, render the first conviction void.

The judgment is reversed, and cause remanded, with instructions to quash the indictment, and discharge the defendant.

JONES v. THE STATE.

CRIMINAL LAW.—Instruction —Grand Larceny.—Value of Property.—On the trial of a defendant indicted for grand larceny, where the value of the property is clearly proved, so as to preclude any question whether the crime is grand or petit larceny, it is not necessary to instruct the jury specially, as to the value of the property.

SAME.—Instruction.—An instruction which states the law correctly, as far as it goes, will not be held erroneous for not stating other propositions of law applicable to the case, there being no special request for further instructions, unless the instructions already given are left in such form as to mislead the jury as to the whole law applicable to the case.

SAME.—Where an instruction in a criminal cause expressly informs the jury that they cannot convict, unless the guilt of the defendant is proved beyond

49	549
180	206
49	549
148	187
148	524
148	525
150	76

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a reasonable doubt, a failure to use the same language in another instruction will not be error.

SAME.—Possession of Stolen Property.—The law imposes upon one who is found in the exclusive possession of property recently stolen the duty of accounting for or explaining how he came into possession of such property, and his failure, when required to speak, to give a satisfactory account of how he came into possession, or the giving of a false account, raises a presumption that such person is the thief. This presumption may be overcome by direct evidence showing that the person accused honestly came into possession, or by the attending circumstances, or by the good character and habits of life of the accused.

SAME.—Evidence.—Where a person having stolen property in his possession bases his defence upon the ground that he purchased the property alleged to have been stolen, of a stranger, and paid him therefor in cash, evidence showing that the accused actually had the money to pay for the property is admissible.

From the Hancock Circuit Court.

H. J. Dunbar and *J. New*, for appellant.

C. A. Buskirk, Attorney General, for the State.

BUSKIRK, J.—The appellant was convicted of grand larceny. The error assigned calls in question the action of the court in overruling the motion for a new trial.

It is claimed that the first and second instructions were erroneous. They are as follows:

“1. In order to a conviction of the defendant in this case, the State must have proved to your satisfaction, that within two years before the finding of the indictment, and in the county of Hancock and State of Indiana, the defendant did feloniously steal, take, and drive away the hogs, or some one or more of them, as alleged in the indictment, and that said hogs were the property of James C. Hank, as alleged.”

Two objections are urged to the above instruction. First, that it ignores the value of the hogs. Second, that the jury were directed that they might convict if the facts stated were proved to their satisfaction; when they should have been instructed that they could not convict unless the facts were proved “beyond a reasonable doubt.”

It is unquestionably true, that the appellant could not have been convicted for grand larceny, unless it was proved that

the hogs stolen were of the value of five dollars or more, or of petit larceny, unless the hogs stolen were shown to be of some value.

The value of the hogs alleged in the indictment to have been stolen was fully proved, and their value was such as to preclude any question as to whether it was grand or petit larceny. The instruction was correct, as far as it went, and if the appellant desired it to be more specific, he should have prepared an instruction covering the point. *Boffandick v. Raleigh*, 11 Ind. 136.

There was no controversy in the court below about the value of the hogs. The evidence of the prosecuting witness and appellant showed the value. The only question was, whether the appellant had purchased or stolen the hogs. The fifth instruction expressly informed the jury that they could not convict unless the guilt of the defendant was proved beyond a reasonable doubt. The two, taken together, were right.

We think the appellant was not injured in his defence by the instruction given.

The second instruction reads as follows:

“2. If you find, from the evidence, that the hogs of James C. Hank had been feloniously stolen, and that recently afterward said hogs were found in the exclusive possession of the defendant, such possession unaccounted for or explained by the defendant would raise a presumption of his guilt; but such presumption of guilt may be explained away or repelled by opposing circumstances, such as unsuspicious conduct connected with the possession.”

It is insisted, that the second instruction is erroneous, because it imposed on the appellant the duty of accounting for or explaining the possession of the stolen property; and because it restricted and limited the modes in which the presumption arising from the exclusive possession of goods recently stolen might be overcome or repelled.

The law imposes upon one who is found in the exclusive possession of property which has been recently stolen, the duty of accounting for it, or explaining how he came into pos-

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session of such property ; and his failure, when required to speak, to give a satisfactory account of how he came into possession, or the giving of a false account, raises a presumption that such person is the thief. This presumption is not conclusive, but may be repelled or overcome in several ways :

First. By direct evidence showing that the person accused honestly came into possession of the stolen property—as that he in good faith purchased the property, or took it in pledge, or that it was deposited with him for safe keeping, or that it was placed in his apparent possession without his knowledge or procurement, and the like.

Second. Such presumption may be excluded or overcome by the attending circumstances, such as the open and notorious possession of the property, and unsuspicious conduct of the accused in reference to the possession, use, and claim of ownership of such property.

Third. Such presumption may be explained away or repelled by the good character and habits of life of the accused.

If the direct evidence, or attending circumstances, or character and habits of life of the accused are sufficient to raise in the minds of the jury a reasonable doubt as to the guilt of the defendant, he should be acquitted. But if the possession of the stolen property is not explained in some of the modes above indicated, so as to establish the innocence of the accused, or create a reasonable doubt as to the guilt of the accused, the presumption becomes conclusive. *Clackner v. The State*, 33 Ind. 412 ; *Smathers v. The State*, 46 Ind. 447, and authorities cited.

The instruction under examination correctly states the presumption, but it is too narrow and restricted in stating the modes in which the presumption may be repelled or explained away. The instruction limits the explanation to “opposing circumstances,” and the illustration given further restricts the “opposing circumstances” to “unsuspicious conduct connected with the possession.”

This excluded from the consideration of the jury the direct

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evidence as to the purchase of the hogs, and the effect of good character and habits of life of the accused.

An instruction which states the law correctly, as far as it goes, will not be held erroneous for not stating other propositions of law applicable to the case, there being no special request for further instructions, unless the instructions already given are left in such form as to mislead the jury as to the whole law applicable to the case. *Hill v. Newman*, 47 Ind. 187.

We think the second instruction does not fully and correctly express the law applicable to the facts of the case, and hence was erroneous.

It is also claimed that the court erred in the exclusion of competent and material evidence, the attention of the court below having been called to the particular evidence objected to in the motion for a new trial. The appellant based his defence upon the ground that he had purchased the hogs alleged to have been stolen from a stranger and paid him therefor in cash forty-five dollars. The appellant testified in his own behalf. His testimony was, in substance, that he had been engaged for several years, in a small way, in the purchase of stock, and especially hogs; that he was returning from Indianapolis to Greenfield, the place of his residence, on the cars; that while conversing with an acquaintance on the cars about stock, a stranger proposed to sell him some hogs, which he said were near Philadelphia, in Hancock county; that he and the stranger got off the cars at Philadelphia, and went into the country one and a half miles to an inclosed woods-pasture, where the stranger showed him thirteen head of hogs, which he claimed to own; that he purchased such hogs of the stranger and paid him therefor forty-five dollars; that he went to his home that night, but returned two days afterward and drove the hogs on the public highway to Greenfield, and drove them through the most public street in said town in broad daylight to his pens; that on the next day he sold the hogs to several persons in Greenfield; that he did not inquire the name of the stranger, because he had no memorandum book with him

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in which to enter his name ; that the stranger gave as a reason for wanting to sell the hogs that he was going to move to Lafayette, but he had not inquired and did not know whether he had moved or not.

The cross examination was quite thorough and searching, and very strongly tended to show that the appellant was a man of small means. When the owner of the hogs called upon the appellant he gave him the same version of the transaction that he testified to on the trial, and had consistently adhered thereto. The failure of the appellant to produce the acquaintance with whom he was conversing on the cars when the stranger proposed to sell him some hogs, and to ascertain whether the stranger had removed, were well calculated to weaken the force of his testimony ; but the reasonableness of his story and the weight due his evidence were questions for the jury.

Upon his re-examination, he was asked to state where and when he procured the money which he paid for the hogs, and upon objection being made, his counsel stated that he proposed to prove that appellant had, on the day before he purchased the hogs, sold a cow and received therefor the money which he paid for the hogs, but the court excluded the evidence.

The evidence offered and excluded would not have been, if admitted, entitled to much weight, but we cannot say it was wholly immaterial. The appellant, from the start, claimed that he had purchased the hogs, and had consistently adhered to such statement. It was abundantly proved by several witnesses that the appellant had driven the hogs to his home over the public highway in daylight, and had driven them through the most public street of Greenfield, in the view of its citizens, and had on the next day openly and publicly driven the hogs to different persons and sold them. The fact that he actually had the money to pay for the hogs, when considered in connection with the unsuspecting circumstances above stated, might have had some influence with the jury. We think it should have been admitted.

The judgment is reversed ; and the cause is remanded for

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a new trial, in accordance with this opinion. The clerk will give the necessary notice for the return of the prisoner.

TAYLOR v. THE STATE.

LIQUOR LAW OF 1873.—Penalties.—To an indictment for selling intoxicating liquor without a permit, the first penalty prescribed in section 14 of the act to regulate the sale of intoxicating liquors (Acts 1873, p. 151) is applicable, and the penalty prescribed in section 10 of said act is applicable to an indictment for selling with a permit, but within the interdicted hours.

CRIMINAL LAW.—Indictment of Two Counts.—General Finding.—Where there are two counts in an indictment, under one of which, if the defendant be found guilty, the fine would be greater than under the other, and the verdict is general, and the fine assessed is the lowest that could be assessed under the indictment, the defendant cannot complain because the verdict does not show under which count he was found guilty.

LIQUOR LAW.—Evidence.—Defence.—Under an indictment for selling intoxicating liquor to be drunk on the premises, without a permit, it is not necessary for the state to prove that the defendant had no permit. If the defendant had a permit, he may show it in defence.

From the Marion Criminal Circuit Court.

H. W. Harrington and *H. Francisco*, for appellant.

C. A. Buskirk, Attorney General, for the State.

BIDDLE, J.—Prosecution under the act of February 27th, 1873, (Acts 1873, p. 151) against the appellant and Charles Wreidt, for selling intoxicating liquors.

The indictment contains two counts. The first count charges the defendants with selling the liquor, to be drunk on the premises, not having a permit, "the said intoxicating liquor being so sold after the hour of nine o'clock of the evening, and before the hour of twelve o'clock, P. M., of said day;" all of which is formally alleged.

The second count is the same as the first, with the exception of an allegation that the defendants had a permit, etc., at

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the time the sale was made, but that it was made within the interdicted hours.

A motion to quash the first count was overruled, and exceptions taken. The defendants then both pleaded not guilty to the entire indictment.

Trial by the court. Finding of guilty against Taylor, and a fine of five dollars; and not guilty as to Wreidt. Motion for a new trial overruled. Exception. Judgment. Appeal.

Errors assigned :

1. Overruling motion to quash first count.
2. In not finding on each count separately.
3. In imposing a fine of five dollars.
4. Overruling the motion for a new trial.

There was no error in overruling the motion to quash the first count of the indictment. The selling without a permit being unlawful at all hours of the day, the allegation of the particular hours may be regarded as surplusage.

This court has already held (*DOWNEY and BUSKIRK, JJ., dissenting*), that section 10 of the act creates no offence independent of section 1, but simply limits the privilege to sell obtained by a permit granted under the first section; that the two sections must be construed together; and that section 10 is applicable only to sales where the liquor is to be drunk on the premises. Otherwise, all sales made on the prohibited days, and within the interdicted hours mentioned in that section, would be indictable offences, however innocent or even commendable they might be. The act will not bear this construction, nor can we suppose that the legislature meant such to be its effect. *Beardsley v. The State, ante*, p. 240; *Fromer v. The State, post*, p. 580; *Crone v. The State, ante*, p. 538.

In the case before us, the penalty prescribed in section 14 is applicable to the first count of the indictment, for selling without a permit; and the penalty provided in section 10 is applicable to the second count, for selling with a permit, but within the interdicted hours.

The act is unskillfully drawn, confused, and complicated; but the above, as it seems to us, is the only safe and practica-

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ble construction that can be given to its loose and uncertain terms.

If the appellant was found guilty under the first count, the fine could not have been less than ten dollars; if under the second count, then the fine could not be less than five dollars; but as the finding is general, it is impossible to ascertain from the record on which count the finding was based.

This error, however, if it be an error, inasmuch as the fine is the lowest that could be assessed under the indictment, is not one of which the appellant can complain. *Griffith v. The State*, 36 Ind. 406.

We have examined the evidence, and think it fairly sustains the finding. It was not necessary that the State should prove that the appellant had no permit. If he had a permit, it would have been good matter of defence under the first count. As to the second count, it was not necessary either to allege or prove that the appellant had a permit, or had not a permit, as neither the allegation nor proof would have affected the case.

The offence under the first count was for unlawfully selling the liquor to be drunk on the premises, without a permit; under the second count, for unlawfully selling the liquor during the interdicted hours, to be drunk on the premises, in which the permit is immaterial.

The judgment is affirmed.

WORDEN, J.—I cannot concur in the conclusion arrived at by a majority of the court. The first count charged that the defendant had no permit. The second charged that he had a permit, as was necessary, in my opinion, in order to show a violation of section 10. The verdict finds the defendant guilty under both counts; that is to say, that he had, and had not, a permit, at one and the same time. The verdict should have specified on which count the defendant was guilty. As it stands, it is utterly inconsistent with itself, and should have been set aside.

PETTIT, C. J.—I concur in the above dissenting opinion.

Moore v. The State, *ex rel.* Atkinson *et al.*

MOORE v. THE STATE, EX REL. ATKINSON ET AL.

ADMINISTRATOR.—*Two Administrators Making One Bond.—Each Surety for the Other.*—Where two persons, administrators of the same estate, join in executing a bond with others as their sureties, for the faithful discharge of their duties, each of such administrators will be held as surety for the other. BUSKIRK, J., dissented.

SAME.—An agreement made by one of such administrators, by which a part of the heirs relinquish all further claim to the estate, will not release him as surety for the other administrator.

SAME.—*Heirs not Entitled to Estate Until Claims are Paid.*—Where there are claims against an estate, in a suit on the relation of the heirs upon the bond of the administrator, it is proper for the court to direct that the amount received be retained by the clerk until the further order of the court.

From the Blackford Circuit Court.

J. Brownlee, for appellant.

W. H. Carroll, for appellees.

WORDEN, J.—This was an action by the State, upon the relation of a part of the heirs at law of George Atkinson, deceased, against the appellant, Moore, upon the administration bond of Moore and William Atkinson.

The bond is as follows, viz:

“Know all men that we, Henry Moore, William Atkinson” (naming others who were sureties), “are bound unto the State of Indiana in the penal sum of thirty-four hundred dollars, for the payment of which we jointly and severally bind ourselves, our heirs, executors, and administrators. Sealed and dated the 23d day of February, 1857. The condition of the above obligation is, that if the above bound Henry Moore and William Atkinson shall faithfully discharge the duties of his trust as administrators of the estate of George Atkinson, deceased, according to law, then the above obligation is to be void, else to remain in full force.”

This bond was duly signed and sealed by the appellant and William Atkinson and their sureties.

It is alleged in the complaint, that in April, 1858, the defendant Moore resigned and was discharged from his trust as such

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administrator, leaving the entire management of the estate to his co-administrator, William Atkinson.

It is alleged, as a breach of the bond, that said William Atkinson converted to his own use over twelve hundred dollars belonging to the estate, and that he has removed from the State of Indiana, having failed to render any account of his proceedings as such administrator.

It is further alleged that the deceased left eight heirs, four of whom are relators herein, and that three of the heirs, naming them (not relators), have heretofore received their full share of the estate, and that the relators and said William Atkinson are entitled to the entire residue of the estate.

The defendant demurred to the complaint, but assigned no statutory cause, except that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and exception taken. Trial by referee, report and judgment in favor of plaintiff for something over seven hundred dollars, over the defendant's motion for a new trial.

We proceed to consider the grounds on which the appellant claims that the judgment should be reversed. We may observe that no objection is made on the ground that all the heirs of the deceased are not made parties to the action. But it is claimed by the appellant that, as he himself has been guilty of no breach of duty as such administrator, having resigned his trust and been discharged therefrom, he cannot be held liable for the malfeasance of his co-administrator. The appellant, if sued otherwise than on his bond, could only be held liable for his own default as such administrator, and not for that of his co-administrator. But, if he is to be regarded as the surety of said William Atkinson, his co-administrator, on the bond, he is doubtless responsible.

The cases of *Braxton v. The State, ex rel. Albert*, 25 Ind. 82, and *Prichard v. The State, ex rel. Keller*, 34 Ind. 137, decide that co-administrators executing bonds like that in suit become sureties for each other. The majority of the court adhere to those cases. The writer of this opinion acquiesces, rather than concurs. This point, therefore, must be held against the appellant.

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The appellant insists that there was such an agreement and settlement between the parties as precludes the maintenance of this action.

The bill of exceptions, in one part of it, says that the referee reported all the evidence, but his report sets out the facts found by him, and not the evidence on which the facts were found; nor is the evidence contained in the record. The report of the referee in respect to the agreement or settlement insisted upon is as follows:

“It appears that there were two sets of children of said deceased; the older set consisting of” (naming the three who are not relators); “the younger set consisting of William Atkinson and the relators in this action. At the time Moore resigned, there was an arrangement made by which the older set of children relinquished all further claim to the estate, and the younger set of children were to receive the balance of the estate after the payment of debts.”

There is nothing in this that releases the appellant from his liability as the surety of William Atkinson. William Atkinson was still bound to administer the estate according to law, and not appropriate the funds to his own use, except, perhaps, the portion coming to himself after the payment of debts and expenses; and the appellant was still bound as surety that he would do so.

It is claimed that items were allowed by the referee against the appellant that should not have been, and hence that the amount found was too much. This question is not before us, inasmuch as the motion for a new trial did not point out, as a ground thereof, either that the damages were excessive, or that there was error in the assessment of the amount of recovery. 2 G. & H. 211, sec. 352.

The brief of counsel for the appellant states that the bill of exceptions shows, that at the time the judgment was rendered “the court inquired if there were claims against the estate, to which the clerk replied, there were. The court then ordered that the money, when collected, remain,” etc. And the coun-

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sel add, "if this indicates the condition of the estate, the heirs cannot recover."

The record shows that the court ordered that the money, when collected on the judgment, remain in the hands of the clerk until the further order of the court. This order was proper, as the money when collected was not to be paid to the relators, but to be paid into court, to be disposed of, after certain deductions, according to the laws regulating the distribution of the property of the decedent. 2 G. & H. 531, sec. 164. This, it has been held, places the money in the control of the court, to be used for purposes for which it may be required. *Owen v. The State, ex rel. Owen*, 25 Ind. 371.

If there were debts against the estate, the court might, therefore, order them paid out of the money.

We have thus examined all the grounds upon which a reversal is sought, and find no error in the record.

The judgment below is affirmed, with costs.

BUSKIRK, C. J.—I dissent from so much of the foregoing opinion as holds that the appellant became the surety of his co-administrator. He executed the bond as a principal, and not as a surety, and he cannot be held liable as a surety.

Besides, the bond cannot be regarded as a common law obligation, as it and its form are prescribed by statute. It is provided, by the nineteenth section of the act for the settlement of decedents' estates, 2 G. & H. 489, that "every person appointed executor, administrator with the will annexed, or administrator, before receiving letters, shall execute a separate bond, with sufficient resident freehold sureties," etc., "conditioned that he will faithfully discharge his duties as such executor or administrator," etc.

The statute imperatively requires a separate bond for each executor or administrator. The bond in suit not being a good common law bond, and not being authorized by statute, is illegal and void. *Caffrey v. Dudgeon*, 38 Ind. 512, and the numerous authorities there cited.

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In my opinion, the cases of *Braxton v. The State, ex rel. Albert*, 25 Ind. 82, and *Prichard v. The State, ex rel. Keller*, 34 Ind. 137, should be squarely overruled.

Opinions filed November term, 1874; petition for a rehearing overruled May term, 1875.

AINSWORTH v. THE STATE.

HOUSE OF REFUGE.—Board of Commissioners.—Rules and Regulations.—The board of commissioners of the house of refuge for the correction and reformation of juvenile offenders, with the approval of the Governor, have power to make rules and regulations in regard to the admission of offenders, so as to require a letter of application giving proper information in regard to the infant whose admission is asked, and also an examination by a respectable medical practitioner as to the physical and mental condition of such person; and the superintendent may refuse to receive an offender until such rules are complied with.

SAME.—Contempt.—The refusal to admit a boy charged with a criminal offence, and ordered to be committed to said institution by the judge of a court, until such rules are complied with, is not a contempt of court.

From the Marion Criminal Circuit Court.

R. D. Doyle, for appellant.

C. A. Buskirk, Attorney General, and *J. M. Cropsey*, Prosecuting Attorney, for the State.

DOWNEY, J. - This was a proceeding against the appellant for contempt.

On the 17th day of March, 1875, James Shannon, charged with larceny, was ordered by the criminal court to be committed to the house of refuge until he attained the age of twenty-one years, unless sooner discharged by the board of commissioners of the institution. On the 29th day of March, 1875, an affidavit was filed in said court, of Alfred Travis, a deputy sheriff of Marion county, that on the 20th day of March, 1875, he tendered the said Shannon, with a certified

copy of the order of commitment to the appellant, as superintendent of the house of refuge, who refused to receive him. The appellant, as such superintendent, appeared in court, and made answer as follows:

“ Comes now said defendant, and makes his answer, showing cause why an attachment for contempt of court should not be granted in the matter wherein the affidavit made by Alfred Travis, on the 29th day of March, 1875, has been filed, and on oath, says that he is the superintendent of the house of refuge for the correction and reformation of juvenile offenders, as stated in said affidavit of said Travis, and was such superintendent on the 20th day of March, 1875; that he was not present in person at the time when said Travis made the application for the admission into said house of refuge of said James Shannon, as stated in said affidavit of said Travis, but that on said day and occasion had left in charge of said institution a subordinate officer thereof, named Thomas B. Westendorf, with instructions and authority to act in the premises, as to the admission of inmates, according to law, into said institution, for and in behalf of this affiant; and that said instructions to said Westendorf were, that before an infant should be admitted into said institution there should be a letter of application for admission into said institution signed by the person or officer having the infant in charge, stating certain particulars and facts as required in section 5 of the printed regulations adopted by the board of control of said institution, with the approval of the Governor of said State; and that there should also be presented and had the certificate of a respectable medical practitioner, showing that he had examined said infant, and answering certain questions in reference to the physical condition of said infant, as prescribed in section 6 of the printed regulations above named; a copy of which regulations is filed herewith, as a part of this answer, marked ‘exhibit A.’

“ Affiant further states, that he is informed and believes that the said Westendorf, acting in conformity with said instructions and regulations, declined to admit said Shannon into

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said institution, for the reason that sections 5 and 6, and the requirements thereof, were not complied with, in this, that the said Travis produced no application and no certificate of medical examination of said infant to said Westendorf, as required by the sections aforesaid.

“Affiant further states that afterward, and after said infant had been returned in the custody of said Travis to the jail of Marion county, there came a certificate of the medical examination of said infant on a subsequent day.

“Affiant further states that no disrespect whatever has been intended on his part toward the authority and dignity of this honorable court, but that he considered, as he still does, that said regulations above referred to ought to be followed and obeyed by him, as they were adopted by the board of control of said institution, and approved by the Governor of the State, under the provisions of the statutes relating to said institution.

“The affiant begs to refer also to a letter from the Governor of the State, not on file, upon the matters involved in such admission of infants, to show this court that no disrespect has been intended toward its authority, a copy of which letter is filed herewith; wherefore, affiant prays to be discharged, and for all proper relief.”

The court, on a demurrer to this answer, held the same insufficient, awarded an attachment, and, on the hearing, adjudged appellant guilty of contempt, assessed a fine against him, and rendered judgment therefor, with costs.

The sustaining of the demurrer to the answer is the only error alleged.

The regulations on the subject of the admission of boys into the institution, to which reference is made in the answer, are as follows:

“Sec. 2. Before any infant shall be conveyed to the house of refuge, the person or officer having him in charge shall address to the superintendent of the institution a letter of application for the admission of such infant into the institution, and said infant shall not be sent to the institution until

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a reply has been returned by the superintendent, stating that he can be received ; said letter of application shall conform in substance to the requirements of sections 5 and 6 hereof.

“ Sec. 5. The letter of application for admission into the institution must be signed by the person or officer having the infant in charge, and must state the following particulars, viz. :

“ 1. The full name of the infant, his age, and, if possible, the day and year of his birth.

“ 2. The father's name, and whether dead or living, and, if living, his place of residence ; also the mother's name, and whether dead or living, and if living, her place of residence ; also the occupation of the parents.

“ 3. Whether the boy has any other near relatives than his parents, and where they reside.

“ 4. Whether he can read, write, and cipher, or do either, and what schools he has attended, if any.

“ 5. What business, if any, he has been employed in.

“ 6. Of what offences he has been accused, and how long it is believed that he has been addicted to the commission of such offences.

“ 7. By what officer or authority he is ordered to be committed to the house of refuge, whether upon the complaint of the parent, guardian, township trustee, or upon the complaint of some other person, and if he is committed under the provisions of the tenth section, state under which of the specifications of that section he is committed.

“ 8. Whether he is to be sent at the public expense, or at the expense of the parent or guardian.

“ Sec. 6. The boy whose admission is sought must be examined by a respectable medical practitioner, who shall certify as to his health according to the following form, viz. :

“ Has the boy perfect vision ?

“ Has he the use of all his limbs ?

“ Is he sound of intellect ?

“ Has he sufficient bodily strength to receive instruction ?

“ Has he any tendency to scrofula or consumption ?

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“Is he perfectly free from any cutaneous disorder?”

“Is he subject to epileptic or other fits?”

“Has he had the small-pox or cow-pox?”

“Has he been vaccinated?”

“I hereby certify that I have examined _____, application for whose admission to the house of refuge is about to be made, and that the above answers to the foregoing questions are, to the best of my knowledge, judgment, and belief, correctly made.”

The clerk of the circuit court must certify to the genuineness of the signature of the medical examiner, and that he is a reputable practitioner resident in the county.

It is conceded by the demurrer to the answer that the regulations were made by the commissioners of the institution and approved by the governor. The question is, had the commissioners power to make the regulations? The fifth section of the act for the establishment of the institution reads as follows:

“Said commissioners may, with the approval of the governor, appoint a suitable superintendent of said institution, and all necessary subordinates, not exceeding a number to be fixed by the governor, and fix their salaries, and shall have power, with the approval of the governor, to make and enforce all such rules, regulations, ordinances, and by-laws for the government and discipline of said institution as they may deem just and proper.” 3 Ind. Stat. 299.

The second section of the act declares, that “the general supervision and government of said institution shall be vested in a board of control, to consist of three commissioners,” etc.

The tenth section is as follows:

“Whenever said institution shall have been so far completed as to properly admit of the reception of youths therein, the governor shall make due proclamation of that fact, and thereafter it shall be lawful for said board of commissioners to receive into their care and guardianship infants under the age,” etc.

The infant in this case would seem from the meager state-

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ment in the record to have been committed under the twelfth section of the act, upon the recommendation of the grand jury.

The object and purposes of the institution, according to the title of the act, are "the correction and reformation of juvenile offenders." The State has provided other institutions for those who are insane, blind, deaf and dumb, etc.

Counsel for the State submit that the commissioners can only adopt rules, etc., for the government and discipline of the institution, and that no power is given to them to adopt rules for the admission of inmates to the institution; that there is a great difference between the government of the institution and the admission of inmates; and that the superintendent can only govern the institution according to the rules prescribed by the commissioners.

We are not willing to admit that the commissioners, or the officers of the institution acting under their regulations, have no discretion whatever as to the persons who shall be admitted to the institution. The capacity of the institution has been and is such as to make it impossible to receive all whose admission is sought, and hence the folly of carrying a boy to the institution and demanding his admission, without previously ascertaining that it is possible to admit him. This is one reason, and a sufficient one, it seems to us, why the second regulation above set forth should exist, and why it should be complied with before the boy is carried to the institution.

The institution may not be provided with a room for every boy, but may be compelled or prefer to group them together in families in the same house, with a common dormitory, wash room, etc., under such circumstances that diseases, infectious or contagious, may be readily and rapidly communicated from one to another. May not the commissioners adopt reasonable regulations to enable them or the superintendent to ascertain whether the boy whose admission is sought has any such disease? If they may not, on such account, exclude the boy from the institution, they may, at least, by this means, enable

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themselves to know whether or not he is fit for intimate association with the other inmates.

It may be desirable or necessary, for other reasons, to classify the boys in the institution, with reference to their age, their advancement in education, and in business or mechanic arts, the crime to which they are addicted and with which they have been charged, and whether they are wholly or comparatively innocent of crime, or greatly hardened therein. Other reasons might be assigned why these regulations should exist, and why they should be complied with.

We are of the opinion that the commissioners and the governor had the power to make the regulations in question, and that the superintendent was not guilty of any contempt of court in refusing to receive the boy Shannon without a compliance therewith.

The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer to the answer.

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EVIDENCE.—*Weight of Evidence and Credibility of Witness for the Jury.*—A court or jury trying a cause hear the testimony of witnesses from the living voice, with whatever peculiar accent, emphasis, or intonation it may have, and see the witness, his countenance, looks, expression of face, manner, readiness or reluctance, and the many nameless indices of truth or falsehood, which it is impossible to put into words; and when the verdict of a jury has received the approval of the court below, and the sole question is the weight of evidence, though the testimony may be contradictory, and not completely satisfactory, the Supreme Court will not disturb the verdict.

From the Boone Circuit Court.

C. C. Galvin and C. S. Wesner, for appellant.

C. A. Buskirk, Attorney General, and *R. D. Doyle*, for the State.

BIDDLE, J.—The appellant, with William L. Randall, was indicted for stealing tobacco and whiskey, and convicted of grand larceny. The proper steps were taken to appeal the case to this court. The points made here are :

1. Refusing to quash the indictment.
2. Insufficiency of the proof.
3. Newly-discovered evidence.

The indictment is good. It was not error to refuse to quash it.

As to the sufficiency of the evidence, the property stolen, its value, ownership, venue, and felonious taking, are clearly proved. The complicity of the appellant with the larceny is the difficult question in the case. As to that point, the evidence is as follows :

William B. Gibson testified : “ That the tobacco had been placed in a fodder-shock on his farm, in the night, from the fact that he found some of the tin-foil that was placed between the layers of tobacco, in said fodder-shock ; a day or two after he, as constable, had a search warrant for the goods, and found them in the possession of William Randall ; that some days afterwards he arrested the defendant, Cox, and was surprised at Cox being mixed up in the affair ; asked him, defendant, how he became implicated in the matter, and defendant Cox said that he did not know ; that he was drunk, and out with the boys.”

Robert Yond testified : “ That when the defendant was arrested and brought to his office for examination, he asked defendant how he became implicated in the affair, as he was much surprised in hearing of Cox being implicated ; Cox told him he was innocent, and did not know how it was ; he was drunk up there with the boys.”

Marcus Orear testified : “ That on the night of the alleged offence, he and defendant, together with William Randall, David Gazaway, and George Jameson, broke in and entered cars and stole tobacco and whiskey, and took it and concealed

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it in the hands of William Randall ; that Cox and Gazaway carried the goods through the house by the way of the railroad ; that he and Randall went round through town ; that Cox took the tobacco off the car and put it in a corn-shock on William Gibson's farm ; that he drew the whiskey out of the barrel, and handed the keg out of the car to the others with him ; that he had appeared and testified as a witness on the trial of William L. Randall, for the same charge, the last term of this court, at which he, said Orear, plead guilty, and that he was now in the penitentiary on the same charge ; that he swore, at the last term of this court, that Cox and Randall had no hand in the stealing of said goods, and knew nothing about it ; that he, said Orear, Gazaway, Jameson, and two strangers did the stealing, and Randall and Cox were not with them ; that after he was first arrested he made oath before Esquire Yond that the defendant, Cox, did not have anything to do with the matter, and had no knowledge of the affair." On being asked now why he testified to the contrary, he said that he thought he would come back and tell the truth ; that he had never communicated his intentions so to do to any person ; had not been requested by any one to do so ; did so of his own volition ; had not been advised by any one to have Cox arrested ; was told by James Evans, one of defendant's attorneys, that if he would swear that said Randall was not guilty, his (Orear's) grandfather would give him, Evans, fifty dollars, and that he would get a reprieve for Orear in six weeks.

The appellant being sworn, in his own defence, said : " That on the night of the alleged stealing of the said goods, he was at home all night ; knew nothing of the larceny ; had nothing to do with it ; had no thought of his being suspicioned or implicated till his arrest ; has no remembrance of statements made by Gibson and Yond ; had no intention at any time to make such statements, from the reason that he well knew all the time that he was innocent, and did not make such statements ; that he did not know the boy Orear ; never saw him but once before, when he got in his way, when he, defend-

ant, was at work ; told him to stand aside ; was the only time he ever spoke to him."

James B. Evans testified : " That he never made any such statements, as Orear said he did, in reference to attempting to induce him, Orear, to swear in Randall's favor, or anything of the kind whatever."

Joseph Sanders, called in rebutting, said : " He was in jail where Cox, Randall, and Orear were ; that he heard James B. Evans say to Orear, that if he would swear that Cox and Randall had no hand in the larceny, James Brush would give him, Evans, fifty dollars, and he would have him reprieved in six weeks."

There is no other evidence in the record touching this point. In considering the weight of testimony by this court, it must be remembered that such evidence comes before us merely in written words ; while the court and jury trying the cause have it from the living voice, with whatever peculiar accent, emphasis, or intonation it may have ; and that they see the witness, his countenance, looks, expression of face, manner, readiness, or reluctance, and the many nameless indices of truth or falsehood, which it is impossible to put in words. A statement of facts in words, though testified to by different witnesses, of various degrees of credibility, comes to us with the same weight, while to the court and jury their weight would be, in some instances, the full import of the words, and in others scarcely worth consideration. Hence it is that the credibility of a witness is a question solely for the jury, they being the triors of fact ; and the presumption in this court must be that they understood their duty, and performed it. And, should they fail to understand or perform their duty, the court that presides over them has a far better opportunity to correct their errors than it is possible for us to have, who sit merely as a court of appeal ; and when the verdict of a jury has received the approval of the court below, and the sole question in the case is the weight of evidence to sustain it, we lay our hands upon the judgment with great reluctance. There must be some clear defect, some link gone or too weak to bind

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the chain of facts, or we cannot disturb it. Keeping these rules in view, we examine the case before us.

The main evidence, in this case, to connect the appellant with the larceny is the testimony of an accomplice, who pleaded guilty to the same crime; and while it is true that a jury may convict solely upon the testimony of an accomplice, it is a rule that should be carefully guarded. The witness, in some degree, is both supported and impeached. He is supported as to the place where the stolen goods were found, and impeached by his own contrary statements as to the connection of the appellant with the larceny. There seems to have been, however, a greater motive to prevaricate in his first statements, as there is some evidence tending to show that the hope of executive clemency had been held out to him, than there was at the time he testified on the last trial. He is also contradicted as to the promise of such clemency, and the witness who contradicts him is also contradicted by another witness. He is somewhat supported by the wavering and confused statements of the appellant when first confronted with this charge, and again contradicted by his testimony on the trial; and, while the first statements of the appellant and his testimony are in serious conflict, they also rest upon different grounds. He is also contradicted by other witnesses. All of these conflicting statements were before the jury, under the eye of the court. The jury found the verdict upon the evidence, and the court has sanctioned it by its judgment; and, though the evidence does not completely satisfy us, we can find no error in the law, and know of no judicial rule by which we can reverse the judgment pronounced below.

The alleged newly-discovered evidence was merely stated in an affidavit, which was not properly made a part of the record; we cannot, therefore, notice the point.

The judgment is affirmed.

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49	573
127	103

PLEADING.—Answer.—To a suit upon a promissory note an answer alleging that there was no valuable consideration for the execution of the note is sufficient.

DURESS.—A promise extorted by terror or violence, whether on the part of the person to whom the promise or obligation is made or that of his agent, may be avoided on the ground of duress.

SAME.—If a party execute an instrument from a well grounded fear of illegal imprisonment, he may avoid it on the ground of duress.

SAME.—To a suit upon a promissory note, it is a good answer to allege that the plaintiff induced the defendant to go with him to a secluded place, and there accused the defendant of having performed an abortion upon the plaintiff's wife, and that a certain person who was then present was an officer, having power to arrest and imprison the defendant, and that the plaintiff there threatened the defendant with immediate arrest and imprisonment, unless the note in suit was made, and fearing such arrest the defendant made the note, and that he had never committed the crime charged.

PLEADING.—Oral Promise.—Want of Consideration.—A want of consideration for an oral promise sued upon may be proved under an answer of general denial.

From the Montgomery Circuit Court.

J. McCabe, for appellant.

J. E. McDonald and *J. M. Butler*, for appellee.

DOWNEY, J.—Bush sued Brown. His complaint consisted of four paragraphs. The first was on a promissory note for four hundred dollars. The second was on a promissory note for twenty-five hundred dollars. The third alleged that, on, etc., there existed a real matter of difference between the plaintiff and defendant, which formed a proper subject of an action in favor of the plaintiff against the defendant, arising out of an alleged tort committed by the defendant against the plaintiff and his family; that the plaintiff was about to commence a suit against the defendant for damages, etc.; that the defendant, learning the intention of the plaintiff, etc., to compromise and settle said matter, etc., agreed to pay the plaintiff three thousand dollars, if the plaintiff would not bring such action; that the plaintiff accepted said proposition. The

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plaintiff then alleges performance of the agreement on his part and a failure on the part of the defendant, demanding judgment in the sum of four thousand dollars. The fourth paragraph of the complaint was not materially different from the third.

The defendant answered as follows :

1. To the first and second paragraphs of the complaint, "that the notes were executed without any legal, valid or valuable consideration whatever, and that there never has existed and there does not now exist any such consideration for said notes."

2. For further answer to the same paragraphs of the complaint, that the notes were obtained from the defendant by fraud, deceit, threats, duress, and restraint, in this, to wit, that on the 24th day of September, 1870, the defendant, being in a very feeble condition, both physically and mentally, having then but partially recovered from a very severe attack of illness, whereby he had been greatly prostrated, went to Jamestown, in, etc. ; that while there, he was approached by the plaintiff, and by him induced to go with him to a retired and secluded place, pretending to have business of great importance to transact with the defendant, and so soon as, by these pretences, said plaintiff had induced the defendant to go into said retired place, the plaintiff then and there charged the defendant with having committed and performed an abortion upon the person of the plaintiff's wife, and represented and induced defendant to believe, and he did then believe, that one Samuel F. Wesner, who was then and there present, was an officer, then having full power to arrest and imprison said defendant, said Wesner at the time aiding and assisting in said representation ; and plaintiff then threatened the defendant with immediate arrest and imprisonment, unless said defendant would then and there execute to said plaintiff the said notes, and give to the plaintiff the sum of one hundred dollars in addition thereto, and said he would take said money and notes by way of compromise and in full satisfaction for said alleged crime ; and the defendant says he had never committed any such act

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or crime as that with which the plaintiff then charged him, but being in a very weak and feeble condition, as before stated, and being by said plaintiff put in great fear of bodily harm at the hands of said plaintiff, he signed said notes under said threats, and at the same time told said plaintiff that he had no hundred dollars to pay him ; and defendant says that the plaintiff wickedly and fraudulently, by conniving and conspiring with one John Couch, the plaintiff's brother-in-law, to cheat and defraud the defendant, caused said Couch to then and there approach the defendant and offer to loan him the one hundred dollars demanded by the plaintiff, and to urge him to take the same and to accede to and comply with the demands of the plaintiff ; and the defendant says that being so restrained and harassed, and put in fear by said plaintiff and said Couch so conspiring as aforesaid to cheat and defraud the defendant, he did, influenced by said restraint and fear of bodily harm, accept the loan of said one hundred dollars as aforesaid, which he paid to said plaintiff, and, influenced, restrained, and fearing as aforesaid, he did at the same time execute said notes, though protesting at the time against the harsh and wrongful measures used against him ; wherefore the defendant says said notes are without any legal or valid consideration whatever. Prayer for judgment for the one hundred dollars, with interest, etc.

3. For answer to the third and fourth paragraphs of the complaint, the defendant pleaded a general denial ; and for a fourth paragraph he pleaded matters amounting to a denial of any consideration for the promises alleged in those paragraphs.

The plaintiff demurred to the first, second, and fourth paragraphs of the answer separately, and the demurrers were all overruled. Reply by a general denial. Trial by a jury, and verdict for the defendant.

A motion for a new trial was made by the plaintiff, and overruled by the court. Final judgment for the defendant.

The errors assigned question the correctness of the rulings of the circuit court in overruling the demurrers to the first,

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second, and fourth paragraphs of the answer, and in refusing to grant a new trial.

The objection urged by counsel for the appellant to the first paragraph of the answer is thus stated: "The objection to the first paragraph is, that it purports to be a plea of no consideration, but the language employed by the pleader is insufficient to make that defence. The language is, that 'said notes were given without any legal or valid or valuable consideration.' This language fairly implies that there was in the mind of the pleader a consideration of some kind, but that, in his judgment, it was neither legal, valid, nor valuable. He has, therefore, stated his legal conclusions to the court instead of stating the facts and allowing the court to exercise its prerogative of drawing the legal conclusions therefrom." If there was no legal, valid, or valuable consideration for the giving of the notes, they are invalid. Considerations are said to be either good or valuable. A valuable consideration is necessary to support an executory contract, and give a right of action thereon. The answer alleges that there was no valuable consideration. There was nothing about which to be more specific. *Webster v. Parker*, 7 Ind. 185.

We think counsel is correct in saying that the second paragraph is not a defence of fraud or want of consideration. It must be sustained as a paragraph relying upon duress, or not at all. Counsel make several objections to this paragraph of the answer. It is urged that it is not denied that Wesner was an officer, having full power to arrest and imprison the defendant, or that the representations concerning his power and authority to arrest were not true; that the natural inference is that he was an officer, armed with a writ for the arrest of the defendant on a civil process growing out of the wrong to the plaintiff's wife; and it is insisted, if such was the case, the threatened arrest was legal, being by virtue of legal process, and would not therefore amount to duress. It is further urged that the paragraph does not deny that the defendant produced the abortion with which he was charged; that he simply alleges "that he never committed any such crime;" that he might,

nevertheless, have been guilty of producing the abortion through ignorance, negligence, unskilfulness, or the like, without being guilty of a crime; and still be liable in a civil action for damages. It may be remarked with reference to this last objection, that counsel has fallen into an error in giving the language of the pleading. The language is, that he had never committed any such "act or crime." It is further urged that if it can be understood, from the conclusion of the paragraph, that the threat of imprisonment had reference to unlawful imprisonment, it does not appear that he executed the notes, etc., from fear of imprisonment, but because "he was put in great fear of bodily harm at the hands of said plaintiff," and that he has failed to show that any such bodily harm was offered by the plaintiff.

The defence of duress is of less frequent occurrence now than formerly, and hence not many cases have been decided by this court involving the question. To give validity to a contract, the law requires the free assent of the party who is to become chargeable thereon; and it therefore avoids any promise extorted from him by terror or violence, whether on the part of the person to whom the promise or obligation is made, or on that of his agent. Contracts made under such circumstances are said to be made under duress. 1 Chitty Con. 269, 11th Amer. ed.

Duress is of two kinds; duress of imprisonment, where a man actually loses his liberty; and duress *per minas*, where the hardship is only threatened and impending. 1 Bl. Com. 131. Either kind of duress, while it does not render the contract absolutely void, will yet enable the party so under duress to avoid it at his option. The party practising the duress cannot take advantage of it. The imprisonment may be in a common prison, or it may be elsewhere. It appears to have been the rule that the imprisonment must have been unlawful, or, if lawful, undue force must have been used, or the party made to endure unnecessary privation, such as want of food, or the like, and he must have entered into the contract

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to obtain his liberty or to avoid such illegal hardship or privation. The mere fact of imprisonment was not deemed sufficient to avoid an agreement obtained through the medium thereof, if the party was in proper custody under the regular process of a court of competent jurisdiction.

Mr. Chitty expresses the opinion that it would be considered that an agreement made while the party was in confinement, in a civil action, regular in form, upon an arrest for a debt, without probable cause, would not be void on the ground of duress. The rule has not been laid down in the American cases quite so strongly against the defence. The following rules would seem to be supported by the authorities:

1. Where there is an arrest for improper purposes, upon valid process.

2. Where there is an arrest for a just cause, but without lawful authority ; or,

3. Where there is an arrest for a just cause, and under lawful authority, for an improper purpose, and the party executes an instrument or pays money to free himself from the arrest, he may avoid the instrument or recover back the money paid. *Meadows v. Smith*, 7 Ire. Eq. 7 ; *Watkins v. Baird*, 6 Mass. 506 ; *Richardson v. Duncan*, 3 N. H. 508 ; *Nelson v. Sudarth*, 1 Hen. & Munf. 350 ; *Severance v. Kimball*, 8 N. H. 386 ; *Fisher v. Shattuck*, 17 Pick. 252 ; *Foss v. Hildreth*, 10 Allen, 76 ; *Hackett v. King*, 6 Allen, 58 ; *Brooks v. Berryhill*, 20 Ind. 97, and cases cited.

If a person, under a legal arrest, make an agreement to pay a debt, he cannot avoid it on the ground of duress. *Shephard v. Watrous*, 3 Caines, 166 ; *Crowell v. Gleason*, 1 Fairf. 325 ; *Meek v. Atkinson*, 1 Bailey, 84 ; *Bowker v. Lowell*, 49 Me. 429.

If a party execute an instrument from a well-grounded fear of illegal imprisonment, he may avoid it on the ground of duress. *Alexander v. Pierce*, 10 N. H. 494 ; *Worcester v. Eaton*, 13 Mass. 371 ; *Whitefield v. Longfellow*, 13 Me. 146 ; *Eddy v. Herrin*, 17 Me. 338 ; *Foss v. Hildreth*, *supra* ; *Foshay v. Ferguson*, 5 Hill N. Y. 154 ; *The Town of Princeton v. Vierling*,

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40 Ind. 340 ; *Bennett v. Ford*, 47 Ind. 264 ; *The Town of Ligonier v. Ackerman*, 46 Ind. 552.

Under these rules, the answer in question would seem not to be liable to the first objection urged against it.

It is alleged that the defendant had not been guilty of any such act or crime, and consequently had the officer been in possession of a writ for his arrest, at the instance of the plaintiff, and had the arrest been made, it would have been illegal within the rules above laid down. For the plaintiff to have caused the arrest of the defendant, when he was innocent of the charge made against him, would, as between them, have been in this sense an illegal arrest, although the officer might have had a writ which, in form, authorized the arrest.

As to the other ground of objection to the answer, we think, taking the answer altogether, it sufficiently appears that the notes were executed and the money paid by the defendant in order that he might be relieved from the threatened arrest.

We see no objection to, nor any use for, the fourth paragraph of the answer. It is not usual or necessary to plead a want of consideration for an oral promise, after pleading a general denial. Under the general denial, the plaintiff was bound to prove a consideration for the promise.

There is no bill of exceptions in the record, and, therefore, we can decide nothing with reference to the overruling of the motion for a new trial.

The judgment is affirmed, with costs.

Opinion filed November term, 1874; petition for a rehearing overruled May term, 1875.

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49 580
165 356

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MOTION FOR NEW TRIAL.—Evidence.—Where the admission of evidence objected to is not assigned as a cause in a motion for a new trial, the ruling cannot be questioned in the Supreme Court.

COSTS.—Number of Witnesses.—The Supreme Court will not presume, from the mere fact that seven witnesses were subpoenaed to prove a person's habit of intoxication, material to the issue, that the process of the court was abused.

From the Decatur Circuit Court.

C. Ewing and *J. K. Ewing*, for appellant.

C. A. Buskirk, Attorney General, and *R. D. Doyle*, for the State.

BIDDLE, J.—Prosecution commenced before a justice of the peace against the appellant, for selling intoxicating liquor to a person who was in the habit of getting intoxicated. Conviction and fine before the justice. Appeal to circuit court. Conviction and fine in the circuit court. Appeal to this court. Acts 1873, p. 151.

In the circuit court, the appellant moved to quash the affidavit. It does not appear in the record that any objection to the affidavit was pointed out to the circuit court, and we can perceive none.

An objection was made by the appellant to the introduction of certain evidence on the trial, and overruled by the court; but as this ruling was not made one of the causes for a new trial, the question is not before us.

The appellant is confident that the evidence does not sustain the finding. We think it does. Every material allegation necessary to constitute the offence is proved beyond reasonable doubt.

It appears that certain witnesses, seven in number, whose names are given, were subpoenaed to prove that the young man to whom the liquor was sold was a person who was in the habit of getting intoxicated, and the appellant moved the court "to strike four of the last names mentioned from such taxation."

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The record does not show what taxation, or whether any, was made. We cannot presume, because seven witnesses were summoned to prove that the person was in the habit of getting intoxicated, that, therefore, the process of the court was abused. For anything the record informs us, each witness might have testified to different facts, at different times and different places, all separately tending to prove the averment that the person was in the habit of getting intoxicated. We must presume in favor of the rulings below. *Leyner v. The State*, 8 Ind. 490.

The appellant makes some other points in his brief which were not made below, and therefore cannot be noticed here.

The judgment is affirmed.

TURNER v. WILSON.

BASTARDY.—*Judgment for Support of Bastard Child not a Debt.*—*Imprisonment.*—*Constitutional Law.*—A judgment against a defendant in a bastardy proceeding, for a sum of money for the support and maintenance of a bastard child, is not a debt within the meaning of section 22 of article 1 of the constitution, after judgment against the defendant, may, by virtue of his bail-piece, take the defendant at any time, in any house or place, in any county, state, or territory.

constitution; and the defendant may in such case be imprisoned.

SAME.—Where a defendant in such case has been arrested, and has given bail, it is not necessary that he should be in actual custody of the sheriff at the time, to enable the court to render a judgment of committal.

SAME.—*Defendant Arrested by His Bail.*—The bail of a defendant in a bas-

From the Jennings Circuit Court.

D. Overmyer, for appellant.

BIDDLE, J.—Petition for a writ of *habeas corpus*, by the appellant against the appellee. The appellee waived service, produced the body of the appellant in open court, and the cause was submitted by agreement, on the following statement of facts:

“That verdict and judgment were rendered against the com-

49	581
124	443
125	9
49	581
140	211

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plainant at the September term, 1874, of this court, in an action by the State of Indiana, on the relation of one Lizzie Bowen, against said complainant Turner, charged with being the father of a certain bastard child, begotten upon the body of said Lizzie; that prior to and at said term of court, this plaintiff was not in custody, being out upon bail, as provided by statute, and he was not in custody at the time of the rendition of said judgment therein; and said judgment proceeds as follows: 'And the court now adjudges that the defendant shall pay to the said relatrix the sum of three hundred dollars, for the support and education of said bastard child, payable as follows, to wit: That he pay to said relatrix the sum of fifty dollars within sixty days from this date; and that he pay her thereafter the further sum of fifty dollars every twelve months until he shall have paid the full sum of three hundred dollars; and that if he fail to make any of said payments at the time the same becomes due, the clerk of this court shall issue execution therefor, to be levied of the property of said defendant and his bail, as in other cases. And it is further adjudged by the court, that the said defendant pay the costs of this prosecution, and that he stand committed until said judgment is paid or replevied.' And the complainant, when the jury retired, being on bail as aforesaid, returned to his home in Seymour, in Jackson county, Indiana, and was not present in person when said verdict was returned into court, nor when said judgment was rendered, but was present all the while by attorney; and that afterwards, on the 5th day of December, 1874, said William H. Shields, who was surety on said Turner's recognizance bond in said bastardy prosecution, procured the clerk of said Jennings county to place in his hands a copy of the recognizance, which is fully set forth in said petition of the complainant herein, and said Shields placed said copy of said recognizance in the hands of the sheriff of Jackson county, Indiana, who thereupon, by virtue of said copy, arrested the complainant in the city of Seymour, Jackson county, Indiana, and endorsed upon said copy the following words: 'Arrested Dr. Abram Turner, within named, and

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now deliver him to the sheriff of Jennings county, this 5th day of December, 1874.

SAMUEL S. EARLY,

‘Sheriff J. County.’

“ And it is agreed, that at that time said Early was sheriff of Jackson county, and that said William B. Wilson was at that time, and is now, the sheriff of Jennings county, and that the sheriff of Jackson county aforesaid arrested the complainant, transported him thence to Vernon, in Jennings county, and placed him in the custody of said sheriff Wilson, in whose custody he has ever since remained, and still remains; and that said judgment against the complainant has not been paid or replevied, and that said sheriff claims to hold this complainant in custody by virtue of said judgment.”

The recognizance referred to in the above statement of facts was in the usual form, conditioned that the appellant would appear before, etc., at, etc., on, etc., “ to answer to the charge of bastardy, and abide the order of said court, and not depart thence without leave,” etc. The bail-piece was an authenticated copy of the recognizance under which the appellant was brought from Jackson county and delivered to the sheriff of Jennings county, as aforesaid. This was all the evidence in the case.

The court below refused to discharge the appellant, and remanded him to jail until the judgment be paid or replevied.

The appellant appeals to this court, and insists:

1. That the law under which he stands committed is unconstitutional.
2. That, if constitutional, he could not be committed to jail, because he was not in custody at the time the judgment was rendered; and,
3. That his surety had no right to arrest him in Jackson county and bring him to Jennings county by virtue of the bail-piece.

The unconstitutionality of the act under which the appellant was committed (2 G. & H. 624), as to the power of imprisonment, is elaborately urged upon us. It is claimed that the judgment under consideration is a debt, within the meaning

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of section 22, art. 1, of the constitution, which abolishes imprisonment for debt, except in case of fraud. We are of a different opinion. A debt is a sum of money due by agreement. It must be certain as to amount, and arise upon contract. Under the system of common law pleading, at the time the constitution was adopted, and before the distinction between forms of action was abolished by the code, the word "debt" in law had no other meaning. We must suppose, therefore, that the framers of the constitution so understood and used the words. Nor could the words of the constitution be fairly understood in any other sense. In the section cited abolishing imprisonment for debt, the words, "any debt or liability thereafter contracted," are expressly used. Besides, the question was fully examined in *Lower v. Wallick*, 25 Ind. 68, and there deliberately settled. This case has been approved and followed, in *The State v. Hamilton*, 33 Ind. 502, *Ex Parte Voltz*, 37 Ind. 237, *Ex Parte Teague*, 41 Ind. 278, and *Reynolds v. Lamount*, 45 Ind. 308. And the same interpretation is given to the word "debt," as used in the constitution, in *McCool v. The State*, 23 Ind. 127.

The distinction between tort and contract exists in the nature of things, and cannot be confounded or abolished by law. One arises by agreement; the other from wrong.

A constitution which abolishes imprisonment for debt does not prohibit the legislature from passing a law to imprison on judgments founded on torts. Cooley Const. Lim. 341.

None but honest debtors are protected from imprisonment for debt; wrong-doers and dishonest men cannot claim the exemption. The act of begetting a bastard child is a tort, contrary to good morals, and a wrong against society; and, to place the obligation imposed by law to support a bastard child upon the same ground with a debt arising by agreement, and to give to such a *tort-feasor* the privileges which are granted only to an honest debtor, would be to confound right and wrong, protect the wrong-doer by law, and impose the obligation due from him upon those who are not guilty of any transgression. Such an interpretation of the constitution

would be unwarrantable, and render that instrument a curse rather than a blessing.

With the severity, laxity, or policy of the law, the court has nothing to do. That is a question for legislative discretion, not judicial interpretation. The power to imprison for torts injurious to the public, and for fraud subversive of private rights, is not denied by the constitution; its exercise must be left to the legislature.

It is claimed that the court could not originally have committed him, and, therefore, could not remand the prisoner to jail, because he was not in custody at the time the judgment was rendered. After the appellant had been arrested, and had given bail, and was in custody of his bail, it was not necessary that he should be in actual custody of the sheriff at the time, to enable the court to render a judgment of committal. This point is decided in the case of *Lower v. Wallick*, *supra*, but upon other grounds.

From the admitted facts in this case, we are not prepared to decide that the appellant was not in legal custody at the time the judgment was rendered. He had been arrested. He gave bail, as provided by statute. He was present at the trial until the jury retired, and then went home, "but was present all the while by attorney." A person arrested by law, and put in the custody of the law, remains in custody, either actually or potentially, until he is discharged according to law. Letting the appellant to bail and allowing him a trial without being in actual custody, was no waiver on the part of the relator, and his voluntary absence cannot be allowed to impair her right or restrict her remedy. No one can take advantage of his own wrong. A defendant cannot be heard to complain of his voluntary absence during the trial of his cause. *McCorkle v. The State*, 14 Ind. 39. While he was on bail, he was in the bail's custody, within the meaning of the law.

It is also insisted, that a surety in a bastardy prosecution has no lawful right to deliver up his principal, and be released from liability on his bond. There is no difference in a bastardy case in this respect from any other case. The rule

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is the same in criminal and civil cases. *Gray v. Fulsome*, 7 Vt. 452; *State v. Thompson*, 3 Jones N. C. 365; *Blood v. Morrill*, 17 Vt. 598; *Simmons v. Adams*, 15 Vt. 677; *Mather v. Clark*, 2 Aik. 209. The common law right, as between the parties, of a bail to take his principal at any time, at any place, and under any jurisdiction, has remained unimpaired during more than two centuries. In the quaint language of the old books, "the bail have their principal always upon a string, and may pull the string whenever they please, and render him in their own discharge." In this country, for anything the principal can complain of, the bail may, by virtue of his piece, take him in any house or place, in any county, state, or territory, on Sunday or any other day, in the night time, or at any time, and, upon demand, may break open doors. He may call persons to assist him, and they will be justified by his command. This right is strictly and uniformly upheld by all the authorities. Our code, in this respect, is in harmony with the common law: 2 G. & H. 126. See, also, the following authorities: Tidd's Pr. 53, 147; Com. Dig. Bail; Bac. Abr. Bail; 6 Mod. 231; *Sheers v. Brooks*, 2 Henry Bl. 120; *Pyewell v. Stow*, 3 Taunton, 425; *Nicolls v. Ingersoll*, 7 Johnson, 145; *Commonwealth v. Brickett*, 8 Pick. 138; *Parker v. Bidwell*, 3 Conn. 84; *Read v. Case*, 4 Conn. 166; *Harp v. Osgood*, 2 Hill N. Y. 216; *Respublica v. Gaoler*, 2 Yeates 263; *Pease v. Burt*, 3 Day, 485; *Ruggles v. Corey*, 3 Conn. 419; *Johnson v. Tompkins*, 1 Bald. 571.

There is nothing in this record of which the appellant has a right to complain.

The judgment is affirmed, with costs.

PETTIT, C. J.—I totally dissent from the opinion in this case for these reasons:

1. The provision of the bastardy act, which provides that, after judgment for money has been rendered, the defendant shall be imprisoned till he pays or replevies the judgment, is a clear and palpable violation of both the letter and spirit of

the twenty-second section of the first article of our constitution, which is this :

“The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted ; and there shall be no imprisonment for debt, except in case of fraud.”

The ingredient of fraud is not in this judgment for bastardy. Webster defines debt thus : “That which is due from one person to another, whether money, goods or services ; that which one person is bound to pay to another, or perform for his benefit ; that of which payment is liable to be exacted ; due ; obligation ; liability.” A judgment for money is a debt, no matter what the cause of action was, whether tort or contract ; the judgment is a debt of record, and the debtor cannot be imprisoned to force or coerce the payment of it, “except in case of fraud,” which does not exist in this case.

2. The bastardy act, unconstitutional as it is as to imprisonment after judgment, does not allow imprisonment after judgment, if the defendant is not in custody when the judgment was rendered. This case shows that the defendant was not in custody at or during the trial, verdict, and judgment, but was under bond, and when the verdict and judgment were rendered, he was absent and in another county, and that the court had no control of his person.

3. The surety on the bond of the defendant in a bastardy case cannot, after judgment, arrest and surrender his principal to the sheriff, and thereby discharge his liability on the bond. The bond will remain in force, and can be recovered on against the surety by suit on it.

I think the judgment ought to be reversed.

WORDEN, J.—I concur in the second and third propositions contained in the foregoing opinion of Judge PETTIT. The word “custody,” as used in the bastardy act, is used in a sense that excludes the idea that when the accused is out on bail he

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is in custody within the meaning of the act ; and not being in custody, the court had no authority to commit him, according to the terms of the statute.

The terms of the bond, as provided for in section 4 of the bastardy act, exclude the idea that after judgment in bastardy the bail may be exonerated by the surrender of the principal. There is no statute applicable to the case providing for such surrender and exoneration.

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SALE.—*Executory Contract.*—A contract for the sale of a certain number of good, corn-fed hogs, to average a certain weight gross, to be weighed at one place and delivered at another, at or within a certain time in the future, and to be then paid for at a certain price per hundred pounds, the hogs being a lot at the time of the contract being fed by the seller, and including some to be thereafter received of another person, where the hogs were never weighed or delivered to the buyer, did not pass the title in the hogs to the purchaser.

SAME.—In a bargain and sale, the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, without regard to the fact whether the goods are delivered to the buyer or remain in possession of the seller.

SAME.—In an executory agreement for a sale, the goods remain the property of the seller till the contract is executed.

SAME.—In the case of a sale, the buyer can claim the goods specifically, and they are at his risk.

SAME.—In the case of an executory agreement, the buyer does not become the owner of the goods, cannot claim them specifically, and they are not at his risk, and his remedy on the contract, if there be a breach of it, is confined to an action for damages.

SAME.—Whether a contract is a bargain and sale or an executory agreement for a sale, depends upon the intention of the parties, to be gathered from all the terms and stipulations of the contract, and is generally a question of fact.

SAME.—A sale of personal property may be complete, so as to pass the title, without a delivery.

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From the Greene Circuit Court.

J. R. Isenhower and *H. Burns*, for appellant.

McDonald & Butler, Rose & Alexander, and *Cavins & Cavins*, for appellee.

DOWNEY, J.—Replevin by the appellee against the appellant, for a lot of one hundred and seventy-five fat hogs, of the value of fifteen hundred dollars, of which it was alleged the plaintiff was the owner and entitled to the possession, and of which the defendant had possession without right, and which he unlawfully detained from the plaintiff.

The defendant answered by a general denial. The cause was tried by a jury, and there was a general verdict for the plaintiff, with answers to several interrogatories, which had been propounded to the jury.

Motions for judgment on the special finding and for a new trial were made by the defendant and overruled by the court. There was final judgment for the plaintiff. Two errors are assigned :

1. The refusal of the court to render judgment for the defendant on the special findings of the jury.

2. The overruling of the motion for a new trial.

The plaintiff claims to be the owner of the property by purchase from one Deckard, and the defendant claims by a subsequent purchase from the same person. The following is the contract, by virtue of which the plaintiff claims the ownership of the hogs :

“TREASURER’S OFFICE, GREENE COUNTY, }
“BLOOMFIELD, IND., Sept. 23d, 1873. }

“Article of agreement made and entered into, this 23d day of September, 1873, between Adam Deckard, of the first part, and Hughes East, of the second part, witnesseth, that the said Deckard has this day sold to the said East seven hundred head of good, corn-fed hogs, to average two hundred and forty pounds gross, to be delivered at Switz City, weighed at H. Van Dyke’s scales in Bloomfield, from November 15th to December 25th, all to be clean, merchantable hogs, no piggy sows or stags. For which said East is to pay four dollars per hundred gross, and to advance at least five dollars per head

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when required, on which said Deckard is to pay twelve per cent. interest. The hogs hereby contracted being the identical lot now being fed by said Deckard, including about eighty head yet to be received of Samuel McElroy.

"Witness our hands and seals.

"ADAM DECKARD, [Seal.]

"HUGHES EAST, [Seal.]"

The special findings of the jury are as follows :

"1. Was the contract that has been introduced in evidence in this cause between East and Deckard the same contract under which East claims title to the property in controversy?

"Ans. Yes.

"2. Were the hogs sold by Deckard to East to be weighed before they were to be delivered to East?

"Ans. Yes.

"3. Were the hogs in controversy ever weighed and delivered to East by Deckard under the contract between Deckard and East?

"Ans. No.

"5. Did Deckard ever deliver the hogs in controversy to East before he sold them to Lester?

"Ans. No.

"6. Did East ever pay Deckard for the hogs in controversy?

"Ans. Yes.

"9. Who was principal and who was surety on the notes given to various parties by Deckard and East, as referred to in the evidence?

"Ans. Deckard principal and East surety.

"10. Who was the owner of and entitled to the possession of the property in controversy at the time of the commencement of this suit?

"Ans. Hughes East.

"11. Did the plaintiff, before the commencement of this suit, demand the possession of the hogs in controversy of the defendant?

"Ans. No."

It is insisted by counsel for the appellant that these special

findings show that there was no completed sale which vested the ownership of the hogs in the plaintiff; that the contract was only an executory contract for the sale and delivery of the hogs at a future date, and that no title to any particular lot of hogs, or any hogs, in fact, passed to East by virtue of the contract; that when anything remains to be done by the seller to put the property into a deliverable condition, or to identify it, or to ascertain its amount, if the price depends upon this, the title to the property does not pass to the buyer, but remains in the seller. It is further submitted that in the contract in the case under consideration there was much to be done to the property by the seller; that the contract was made on the 23d day of September for the delivery of fat hogs from November 15th to December 25th following; that it is evident that the hogs, at the time of making the contract, were what are called "stock hogs," unfatted, but were to be fatted between the date of the contract and the time of delivery; that the hogs, when ready for delivery, were to be weighed at one place and delivered at another, the two places being, as is urged, six miles apart; and that until these things were done by the seller, no property passed to the purchaser.

Counsel for the appellee contend, on the contrary, that by the force and effect of the written contract, the property in the hogs passed to the purchaser, and also that by virtue of the full payment for the hogs, and the same being ascertained, identified, and pointed out, the title would have passed without the written contract.

The jury found, in their answers to the interrogatories, the following facts:

1. That East claims title to the hogs under the written contract set out.
2. That the hogs were to be weighed before they were to be delivered to East. This, too, is in accordance with the terms of the contract.
3. That the hogs were never weighed and delivered to East by Deckard, under the contract.

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4. That Deckard never delivered the hogs to East before he sold them to Lester.

These propositions, it is insisted, are inconsistent with the general verdict. The other findings are not claimed to be contrary to, or inconsistent with, the general verdict.

There is a plain difference between an actual sale and a mere executory agreement. The distinction between the two consists in this, that in a bargain and sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods are delivered to the buyer, or remain in possession of the vendor. Whereas, in the executory agreement, the goods remain the property of the vendor till the contract is executed. In the case of a sale, the vendee can claim the goods specifically, and they are at his risk. In the case of an executory agreement, he does not become the owner of the goods, cannot claim them specifically, and they are not at his risk, and his remedy on the contract, if there be a breach of it, is confined to an action for damages. Both of these contracts are equally valid, and whether any particular contract is the one or the other depends, upon the intention of the parties, to be gathered from all its terms and stipulations. The question is generally, if not always, one of fact. Whether the title to the property passes or not, depends upon the intention of the parties to the agreement.

Whether the contract in this case was a completed sale, or only an executory contract, is to be decided by the facts which existed when the contract was made, and not by what occurred at some subsequent date.

The contract was for seven hundred hogs. This action is for the recovery of the possession of one hundred and seventy-five hogs, part of the number contracted for. If the contract vested in the purchaser title to none of the hogs, then the case should have been decided against him.

Several cases in this court are cited, and we will refer to them in the first place.

In *Bradley v. Michael*, 1 Ind. 551, where the cattle sold

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were sufficiently designated, the price agreed upon, and part of it paid, and part of the cattle delivered, it was held that the property in all the cattle passed, but the seller had a lien on the cattle not yet delivered for the residue of the agreed price, without the payment of which the purchaser had no right to the possession of them.

The case of *Murphy v. The State*, 1 Ind. 366, was a case where the purchaser contracted for a quart of whiskey, and it was delivered to him by the pint. It was held that only so much as was delivered was sold, and therefore there was a sale of less than a quart.

✓ In *Williams v. Smith*, 7 Ind. 559, a tenant had agreed to pay as rent a third of the wheat raised "in the half bushel," and it was held that until the wheat was delivered to the landlord he had no property in it, and it was not subject to an execution against him.

In *Moffatt v. Green*, 9 Ind. 198, which related to the sale of cross-ties, it was said: "Where there has been a sale of goods, and, according to the terms of the contract, something remains to be done before the sale can be considered as complete, until that is done, the property does not pass to the vendee." But it was held that the counting of the ties by a third person, as provided in the contract, might be waived, and the parties rely on their own count.

Straus v. Ross, 25 Ind. 300, was a case where the seller contracted to sell and deliver to the purchaser his clip of wool, at a stipulated price per pound, part of which was paid in hand; the purchaser was to go to the house of the seller on a particular day, and the parties were then to go to the town, where the wool was to be weighed, and where the purchaser was to pay the residue of the price and receive the wool. It was held that the contract was executory, and the property in the wool did not pass.

In the case of *Henline v. Hall*, 4 Ind. 189, relating to the ownership of a colt, which was purchased for twenty dollars, the parties agreeing that the colt should run with the mare

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until it was weaned, when it should be delivered to the purchaser, who was then to pay for it, the transaction was held to be a sale.

✓ *Cloud v. Moorman*, 18 Ind. 40, was a case involving the question of delivery of the property sold, and it was held that where a lot of ship-stuff was sold, part to one purchaser and the residue to another, a delivery to one might be made for the benefit of both.

✓ *Scott v. King*, 12 Ind. 203, related to a sale of corn, and it was held that as the corn had been measured, set apart, and paid for, the sale was complete. The case also decides a question as to waiver of one of the stipulations of the contract.

There are other cases in this court, not cited by counsel, bearing upon the question under consideration.

There is no doubt that a sale of personal property may be complete, so as to pass the title without a delivery. *Ramsey v. Kochenour*, 8 Blackf. 325; *Bradley v. Michael*, *supra*; *Wright v. Maxwell*, 9 Ind. 192; *Sherry v. Picken*, 10 Ind. 375. And see *Davis v. Murphy*, 14 Ind. 158.

So, there is no doubt that the title may pass without payment of the purchase-money, where such is the intention of the parties. This is the case in sales on credit. On the subject generally, see Story on Sales, sec. 296, *et seq.*, and Hilliard on Sales, 53, *et seq.*

Benjamin, in his work on Sales, p. 228, which evinces great research and learning, states the general rules on this subject as follows:

“When the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory agreement. If A. buys from B. ten sheep, to be delivered hereafter, or ten sheep out of a flock of fifty, whether A. is to select them, or B. is to choose which he will deliver, or any other mode of separating the ten sheep from the remainder, be agreed on, it is plain that no ten sheep in the flock can have changed owners by the mere contract; that something more must be done before it can be true

that any particular sheep can be said to have ceased to belong to B., and to have become the property of A.

“But on the other hand, the goods sold may be specific, as if there be in the case supposed only ten sheep in a flock, and A. agrees to buy them all. In such case, there may remain nothing to be done to the sheep, and the bargain may be for immediate delivery, or it may be that the vendor is to have the right to shear them before delivery, or may be bound to fatten them, or furnish pasture for a certain time before the buyer takes them, or they may be sold at a certain price, by weight, or various other circumstances may occur which leave it doubtful whether the real intention of the parties is that the sale is to take effect after the sheep have been sheared, or fattened, or weighed, as the case may be, or whether the sheep are to become at once the property of the buyer, subject to the vendor's right to take the wool, or to his obligation to furnish pasturage, or to his duty to weigh them. And difficulties arise in determining such questions, not only because parties fail to manifest their intentions, but because not uncommonly they have no definite intentions, because they have not thought of the subject. When there has been no manifestation of intention, the presumption of law is that the contract is an actual sale, if the specific thing is agreed on, and it is ready for immediate delivery; but that the contract is only executory when the goods have not been specified, or if when specified, something remains to be done to them by the vendor, either to put them into a deliverable shape, or to ascertain the price. In the former case, there is no reason for imputing to the parties any intention to suspend the transfer of the property, inasmuch as the thing and the price have been mutually assented to, and nothing remains to be done. In the latter case, where something is to be done to the goods, it is presumed that they intended to make the transfer of the property dependent upon the performance of the things yet to be done, as a condition precedent. Of course, these presumptions yield to proof of a contrary intent, and it must be repeated that nothing prevents the parties from agreeing that the property

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in a specific thing sold and ready for delivery, is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession, and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured, as a cargo of corn, in bulk, sold at a certain price per pound, or per bushel."

The legal definition of a sale is not so difficult to determine as what rule to apply to any given state of facts. In this case, we have come to the conclusion that, upon the contract, in connection with the facts found by the jury in answer to the interrogatories, there was no sale of the hogs in question. It is evident from the contract that the hogs were not sold on a credit, but were to be paid for on delivery, and the amount which was to be paid could only be ascertained by weighing the hogs. The hogs were to be "good, corn-fed." The seller was to feed the hogs, and weigh and deliver them, at which time the purchaser was to pay for them. The case, in this respect, is scarcely as favorable to the purchaser as the case of *Straus v. Ross, supra*. In that case, there was no uncertainty as to the wool sold. It was the seller's clip of wool. The price per pound was agreed upon, and part of it was paid. The only things remaining to be done were the weighing and delivering of the wool and the payment therefor. It was held the property did not pass by the contract. There is some uncertainty here as to the hogs to which the contract related. The concluding sentence of the contract is, that the hogs contracted for were the identical lot then being fed by Deckard, including about eighty head yet to be received of Samuel McElroy. The purchaser was not bound, however, to accept all the hogs in the lot, for the contract says they were "all to be merchantable hogs, no piggy sows or stags." This stipulation is inconsistent with the idea that the purchaser was to take all the hogs in the lot, and introduces uncertainty into the contract as to the hogs to which it relates. Then, again, there were hogs to come from McElroy's, the identity and exact number of which do not appear. The jury found that the hogs had not been weighed or delivered, and consequently the price

could not have been paid, because it could not have been known. Had there been no uncertainty as to the hogs embraced by the contract, the title could not have passed for these reasons. The fact that the jury found that payment had been made, without saying when or anything else about it, cannot avoid the force of the other facts specially found by the jury. The tenth interrogatory and answer by the jury amount to no more than a repetition of the general verdict, which, we think, must yield to the special findings of the jury.

Although it seems unnecessary, we have looked into the bill of exceptions to ascertain how the case stands upon the evidence, and have found that, upon the evidence, the case is still more clearly in favor of the appellant.

As to the identity of the hogs sold, the evidence is uncontradicted that there were only about one hundred head of them in possession of Deckard at the time the contract was executed; thus rendering it clear that the hogs intended to be embraced in the contract were not ascertained and set apart, so that the property in them could pass by the contract.

Again, the purchaser had no right under the contract to have the hogs delivered to him until the 25th day of December, 1873, which was named as the day when the period for delivery would expire; and yet this action was commenced, and the hogs taken, on the 17th day of December, 1873.

And, again, East claimed that he had the right to pay off certain notes, on which he was the surety of Deckard, and have the amount credited to him on the price of the hogs. Deckard tendered him hogs before the expiration of the time for delivery, and offered to let him have them upon payment of the price. East did not pay the price, either in money and the notes referred to, or in any other way, but desired Deckard to let him take the hogs without thus making payment for them. To this Deckard refused to assent, and drove the hogs away and sold them to the appellant.

We do not think Deckard was bound to part with the hogs upon the mere promise of East to discharge and take up the notes of Deckard at some other time.

The Brookville National Bank v. Deitz *et al.*

We think a new trial should have been granted. But having come to the conclusion that the appellant was entitled to judgment on the special findings of the jury, the case must take that course on its return to the circuit court.

The judgment is reversed, with costs, and the cause remanded, with instructions to render judgment in favor of the defendant on the special findings.

BUSKIRK, J.—I agree that the judgment in this case must be reversed, but in my judgment the cause ought to be remanded for a new trial; and, hence, I dissent from the judgment rendered, and think a rehearing should be granted, or that the opinion should be so modified as to remand the cause for another trial.

Petition for a rehearing overruled.

THE BROOKVILLE NATIONAL BANK v. DEITZ ET AL.

PROCEEDING SUPPLEMENTARY TO EXECUTION.—*Special Deposit.*—A. advanced a certain sum of money to B., to be used for the redemption of certain land which had been purchased by C. on execution, it being expressly stipulated between A. and B. that the ownership of the money should remain in A., unless it should be received by C. in redemption of the land, there being some dispute as to the right of B. to redeem. The money was placed in the hands of the clerk of the court in which the judgment had been rendered on which the land was sold. If the money should be used in redemption of the land, B. was to repay A., if B. should sell the land; if he should not sell it, B. was to give A. a mortgage on the land redeemed, to secure the repayment of the money. If the money should not be so used, A. was to withdraw it. Proceeding supplementary to execution by D., a judgment creditor of B., against B. and said clerk, to subject to D.'s judgment said money in the hands of the clerk, C. having refused to receive it, and the right to redeem, so far as appeared, not having been settled.

Held, that the money remained the property of A., and could not be subjected to D.'s judgment.

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From the Franklin Common Pleas.

C. C. Binkley and *G. Holland*, for appellant.

W. Morrow, *N. Trusler*, *T. B. Adams*, and *F. Berry*, for appellees.

WORDEN, J.—This was a proceeding by the appellant against the appellees, supplementary to execution. The court, upon the trial of the cause, found for the defendants, and rendered judgment accordingly, over a motion by the plaintiffs for a new trial. The following are the material facts in the case :

The appellant had a judgment against Ulysses V. Kyger, Daniel Kyger, and the defendant Deitz, for over seven hundred dollars, on which an execution had been issued and returned, realizing only a small part of the judgment. A case was shown authorizing the proceedings, so far as the issuing and return of execution are concerned. It was alleged that the defendant Harrell had two thousand dollars in his hands belonging to said Deitz, which ought to be applied to the payment of the appellant's judgment.

The facts in relation to the money in the hands of Harrell, as fairly indicated by the evidence, are as follows: Deitz claimed the right to redeem certain lands which one Roberts had purchased upon execution, and for the purpose of enabling him to do so Lawrence Tragesser advanced to him sufficient money for that purpose, amounting to two thousand two hundred and sixty-five dollars, which was placed in the hands of Harrell, who was the clerk of the court in which the judgment was rendered on which the sale was made. It was expressly stipulated between Tragesser and Deitz that the title and ownership of the money should remain in Tragesser, unless it should be received by Roberts in redemption of the land, there being some doubt or dispute as to the right of Deitz to redeem. If the money was not used in the redemption of the land, Tragesser was to withdraw it; and if used, Deitz was to repay Tragesser, if he sold the land, and if not he was to give him a mortgage upon it to secure the amount. In short, Tragesser permitted his money to be deposited with the clerk, to

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be used in the redemption of the land, not parting with the title, but authorizing it to be applied to the purpose mentioned. Roberts declined to accept the money, and the right of Deitz to redeem has not, so far as appears, been settled. Harrell still holds the identical money thus deposited with him.

Upon these facts, the money thus deposited with Harrell cannot be regarded as the money of Deitz, and consequently cannot be subjected to the payment of the appellant's judgment. The title still remains in Tragesser, the clerk having authority to apply it to the redemption of the land; and, until such application is made, the contingency will not arise on which Deitz is to become the debtor of Tragesser for the money.

The appellant claims that the arrangement is contrary to public policy and illegal.

We see nothing contravening public policy or illegal in the transaction. Tragesser might, for obvious reasons and for good purposes, be willing to aid Deitz in the redemption of the land, while he might not be willing to advance the money to him except upon the certainty of its being applied to that and no other purpose.

It is claimed that the court erred in the exclusion of certain evidence offered by the appellant. The motion for a new trial, however, is insufficient to raise any question upon this point.

The reasons for a new trial do not point out or show what evidence was excluded. See *Ball v. Balfe*, 41 Ind. 221.

The judgment below is affirmed, with costs.

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1. *Appeal from Justice of the Peace.—Waiver.*—Where a cause, commenced before a justice of the peace, was appealed by the defendant to the circuit court, and he there amended his answer of counter-claim, so as to claim a judgment against the plaintiff for seven hundred dollars after satisfying the claim of the plaintiff, the plaintiff not objecting to the amendment or taking any steps in relation thereto, and after issue joined upon the answer, the cause was, by agreement, referred to arbitrators, whose decision was to be final, judgment to be rendered thereon, and the arbitrators heard the cause, and reported to the court a finding in favor of the defendant for three hundred and ninety-seven dollars and sixty-eight cents, it was then too late for the plaintiff to object, he having waived the objection to the amount claimed by the defendant's amendment, which he might have made at the proper time, and it was error for the court to then dismiss the cause.
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diced by such amendment; but if an application is made for delay, either to plead or prepare for trial, and is overruled, then the Supreme Court will determine whether there has been such an abuse of discretion as injuriously affected the rights of such party. *Ib.*

4. *Same.*—Where a court overrules an application for leave to amend, in the cases above stated, the Supreme Court will, in the absence of a showing that there has been an abuse of discretion prejudicial to the rights of the party applying, presume that the action of the court was correct. *Ib.*

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1. *Umpire.*—By a parol agreement to submit a matter in controversy to the arbitration of two persons, it was stipulated that, in case they could not agree, they should select an umpire, and that the decision of such umpire and any of said arbitrators should be final, etc.
Held, that the decision of the umpire was all that was required. If one or both the arbitrators had agreed with him, it would still have been the decision of the umpire. *Sanford et al. v. Wood*, 165
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ARREST.

See BASTARDY, 3; POLICE OFFICER.

1. *Made Without Writ.*—A peace officer may arrest for a misdemeanor without a warrant, only on view. He may arrest for a felony without a warrant on view, or upon information when he has reasonable or probable cause to believe that a felony has been committed; but if a private person arrest another for felony on information, and not on view, it devolves on him to justify by showing that the party arrested was guilty of the crime charged. *Dering v. The State*, 56
2. *Officer Justified if Process be Good on its Face.*—A warrant of arrest and mittimus issued by a justice of the peace having jurisdiction of the offence charged, each being good on its face, will justify a constable in making the arrest and commitment. *Jeffries et al. v. McNamara*, 142
3. *Return on Writ for Arrest.*—A writ for the arrest of a party, issued by a justice of the peace and returned, "served as commanded, and the defendant is present," shows the arrest of the party. *Fisher v. Hamilton*, 341

ATTORNEY.

See INSANE PERSON.

BAIL.

See BASTARDY, 3.

BASTARDY.

1. *Judgment for Support of Bastard Child not a Debt.—Imprisonment.—Constitutional Law.*—A judgment against a defendant in a bastardy proceeding, for a sum of money for the support and maintenance of a bastard child, is not a debt within the meaning of section 22 of article 1 of the constitution; and the defendant may in such case be imprisoned.
Turner v. Wilson, 581
2. *Same.*—Where a defendant in such case has been arrested, and has given bail, it is not necessary that he should be in actual custody of the sheriff at the time, to enable the court to render a judgment of committal. *Ib.*
3. *Same.—Defendant Arrested by His Bail.*—The bail of a defendant in a bastardy proceeding, after judgment against the defendant, may, by virtue of his bail-piece, take the defendant at any time, in any house or place, in any county, state, or territory. *Ib.*

BILL OF EXCEPTIONS.

See CRIMINAL LAW, 8; NEW TRIAL, 3; PRACTICE, 5.

1. *Filing.*—A paper purporting to be a bill of exceptions, which shows that it was signed by the judge after the term, but does not show when it was filed, or whether it was ever filed, is no part of the record.
Jeffries et al. v. McNamara, 142
2. *Amendment of.*—After a bill of exceptions has been signed and filed, it is competent for the court, on notice and motion, to order its correction by the insertion of omitted evidence.
The J., M. & I. R. R. Co. v. Bowen, 154
3. *Pleading Struck Out.*—When a pleading is struck out, it can only be brought into the record again by a bill of exceptions.
Comer et ux. v. Himes et al., 482

BILL OF LADING.

See COMMON CARRIER, 1, 2.

BURDEN OF PROOF.

See PROMISSORY NOTE, 6.

CASES OVERRULED.

Advancements.—*Woolery v. Woolery*, 29 Ind. 249, and *Hamlyn v. Nesbit*, 37 Ind. 284, overruled. *Harness et al. v. Harness et al.*, 384

CIRCUIT COURT.

Prosecution by Affidavit and Information.—In the absence of an indictment, there can be no prosecution for a criminal offence commenced in the circuit court upon an affidavit without an information.
Allstott v. The State, 233

CITY.

See EVIDENCE, 11, 12; INJUNCTION; POLICE OFFICER.

1. *City Council.—Power to Borrow Money.*—Where a city negotiated her bonds to raise means to construct water-works, and the city treasurer misapplied a part of the funds so realized, leaving debts unpaid on account of such works, it was competent for the city council to issue and sell other bonds to make up such deficiency.
Daily et al. v. The City of Columbus, 169
2. *Same.—Statutes.*—By the statute of 1871 (Acts 1871, p. 8), the common council of a city is authorized to issue and sell such bonds of the city as, in the discretion of the council, may be necessary to carry out contracts theretofore made in and about the construction of water-works,

and to fully complete such works; and by the act of March 7th, 1873, it may provide for paying ten per cent. interest on such bonds. *Ib.*

3. *Deputy City Treasurer.*—There cannot be a deputy treasurer of a city, organized under the act of March 14th, 1867, 3 Ind. Stat. 63, without the approval and consent of the council of such city.

Humphreys v. Stevens et al., 491

COMMON CARRIER.

See PLEADING, 12.

1. *Bill of Lading.—Construction of.*—Where a railroad company received freight to be transported partly by rail and partly by water, and it was stipulated in the bill of lading, that "it is especially agreed and understood that the company is not responsible * * for loss or damage on the lakes or rivers, unless it can be shown that such damage or loss occurred through the negligence or default of the agents of the company;" and the freight, after being carried by the defendant, was placed upon a wharfboat, awaiting the arrival of a packet wherein to ship it, and the wharfboat sunk without the fault of the railroad company, and the freight was lost;

Held, that the loss was not one occurring on the lakes and rivers within the meaning of the bill of lading.

Held, also, that the bill of lading should be construed to mean, that the carrier was not to be responsible, in the absence of negligence, for loss or damage occurring in the navigation of the lakes or rivers.

The St. L. & S. E. R. W. Co. v. Smuck et al., 302

2. *Same.*—Contracts not clear in their meaning, by which common carriers seek to avoid the responsibility which the law imposes upon them, should be construed most strongly against them. *Ib.*

CONSIDERATION.

1. *Pleading.*—In a pleading founded upon a contract, the consideration must be stated as well as the promise, except when the pleading is upon a deed, bill of exchange, promissory note, or other instrument in writing which imports a consideration; and in alleging the consideration, it is not sufficient to say that the promise was made for a full and valuable consideration, but particular facts, legally sufficient to support the promise, must be stated. *Leach et al. v. Rhodes, Adm'r*, 291

2. *Same.*—A complaint by the assignee against the assignor of a promissory note, upon a parol agreement that the latter would guarantee the prompt payment of the note, and that he would collect the note and pay the amount over to the plaintiff, if not paid by the maker, did not allege a consideration for such promise.

Held, that the complaint was insufficient. *Ib.*

3. *Answer.*—To a suit upon a promissory note, an answer alleging that there was no valuable consideration for the execution of the note is sufficient.

Rush v. Brown, 573

4. *Oral Promise.—Want of Consideration.*—A want of consideration for an oral promise sued upon may be proved under an answer of general denial.

Ib.

CONSPIRACY.

See CRIMINAL LAW, 10, 11, 12.

CONSTABLE.

See ARREST, 2.

CONSTITUTIONAL LAW.

See BASTARDY, 1; CRIMINAL LAW, 10; RAILROAD, 1.

CONTEMPT.

See HOUSE OF REFUGE, 2.

CONTINUANCE.

Sufficiency of Affidavit.—An affidavit for a continuance, filed on behalf of defendants, on the ground of the absence of a defendant who was also a witness, showing that he was not present at the calling of the cause, but not showing that he would not or could not be present at and during the trial, or that any diligence had been used by himself or his co-defendants to secure his attendance, and giving no reason for his absence, was insufficient. *Chamberlain et al. v. Reid*, 332

CONTRACT.

See COMMON CARRIER, 1, 2; CONSIDERATION; OFFICE AND OFFICER, 4; PLEADING, 12 to 15; SALE; TELEGRAPH, 1.

CORPORATION.

Voluntary Association.—Two incorporators, where all the others have withdrawn, are enough to continue a voluntary association, incorporated under the act of February 20th, 1867, 3 Ind. Stat. 550. *Humphreys v. Stevens et al.*, 491

COSTS.

See EXECUTOR AND ADMINISTRATOR, 1; PRACTICE, 9, 10; SURETY OF THE PEACE, 1; WITNESS.

COUNTY AUDITOR.

See COUNTY TREASURER, 3; RELATOR, 2, 3, 4.

COUNTY TREASURER.

See RELATOR, 2, 3, 4.

1. *Fees.—Statute Construed.*—During the war of the Rebellion, the county of Fountain issued county orders to a large amount, to pay bounties to volunteers for the army of the United States, all of which were afterward paid out of funds raised by taxation. The treasurer demanded two and one-half per cent. on the orders so paid, under sec. 1 of the act of June 4th, 1861, 3 Ind. Stat. 247.

Held, that as the money with which said orders were paid was the product of taxation, the treasurer was not entitled to any commission for paying it out. His compensation was limited to five cents for each order redeemed by him. *King v. The Board of Comm'rs of Fountain Co.*, 13

2. *Office.—Appointment.*—Where a county treasurer, whose term would have expired on the 26th day of August, 1875, vacated his office on the 4th day of September, 1874, a person appointed treasurer on the same day could only hold the office until his successor was elected and qualified, and he was properly required to deliver the office to a person elected treasurer at the regular October election in 1874.

Beale v. The State, ex rel. Gray, 41

3. *Official Bond.—Relator.—Practice.*—Complaint on the official bond of a county treasurer, on the relation of a township, alleging as breaches, that the principal in the bond, while treasurer, received and had in his hands certain funds belonging to the relator, and that after he ceased to be treasurer orders were issued therefor, in favor of the trustee of the relator, upon the treasurer of the county, which the defendant refused to pay,

and that he has refused to pay the amounts of the orders to his successor in office, and has converted the same to his own use.

Held, that, on ceasing to be county treasurer, it was his duty to pay all the public money in his hands to his successor in office, and he could not legally pay the same out on warrants thereafter drawn on the treasurer.

Held, also (PERTIT, J., dissenting), that the suit should have been brought on the relation of the county auditor, instead of the township.

Taggart et al. v. The State, ex rel. Jackson T'p, 42

4. *Taxes Unpaid Standing Charged against Treasurer on Final Settlement.—Statute.—Lien.*—Section 193, 1 G. & H. 113, provides, that "if any county treasurer, on making settlement with the county auditor, shall stand charged with any tax remaining unpaid, and shall not receive a credit therefor in such settlement, such treasurer may collect such tax for his own use, at any time within one year after such settlement, either by distress and sale, as hereinbefore provided, or by action of debt in his own name, before any justice of the peace, or court having jurisdiction."

Held, in an action, based on this section, against the owner of the property against which the taxes in question were assessed, and the mortgagee of certain real estate constituting a part thereof, that a lien could not be declared upon such real estate for the amount of said taxes.

Schaum et al. v. Showers, 285

CRIMINAL LAW.

See ARREST, 1; INSTRUCTIONS TO JURY, 1, 3; LIQUOR LAW.

1. *Practice.—Argument to Jury.*—On the trial of an indictment for murder, it is error for counsel for the State, in argument to the jury, to comment on the frequent occurrence of murder in the community and the formation of vigilance committees and mobs, and to state that the same are caused by laxity in the administration of the law, and that they should make an example of the defendant, and for the court, upon objection by the defendant to such language, to remark to the jury that such matters are proper to be commented upon.

Ferguson v. The State, 33

2. *Instruction.—Murder.—Homicide upon Provocation.*—On the trial of a defendant on an indictment for murder in the first degree, it was error to instruct the jury, that "to reduce a homicide upon provocation, it is essential that the fatal blow shall have been given immediately upon the provocation given; for if there be time sufficient for the passion to subside, and the person provoked kill the other, this will be murder, and not manslaughter."

Ib.

3. *Forgery.—Intent to Defraud.*—On the trial of a defendant on an indictment for forgery, the intent to defraud may be inferred from the facts and circumstances proved in the cause.

Fletcher v. The State, 124

4. *Evidence.—Part of Conversation.*—On the trial of a criminal cause, where a conversation, part of which is admissible in evidence, contains admissions tending to show that the defendant was charged with, or was guilty of, a similar offence before, the whole conversation may be given if it cannot be separated, but the jury should be instructed that the admissions should not be considered for any purpose connected with the guilt or innocence of the defendant, or the extent of punishment, if found guilty.

Ib.

5. *Same.—Character of Accused.*—The law invests every person accused of crime with a presumption in favor of good character, and the State cannot offer evidence to impeach such character until the accused has put his general character in issue, by offering evidence in support of it.

Ib.

6. *Same.—Impeachment of Witness.*—In a criminal cause, a witness cannot be impeached or sustained by proof of general moral character.

Ib.

7. *Argument of Counsel.*—Where a defendant in a criminal cause has not

- produced any evidence to sustain his general reputation and moral character, it is improper for counsel to argue to the jury that his failure to do so may be considered against him. *Ib.*
8. *Practice.—Bill of Exceptions.*—In a criminal cause, where a bill of exceptions is signed and filed during the term, and it shows that the exceptions were taken at the time of the ruling, and that time was given "until now" to file the bill, it will be properly in the record. *Ib.*
9. *Obstructing Highway.—Affidavit.*—An affidavit, warrant for arrest, and mittimus, charging that the defendant did unlawfully and knowingly obstruct a certain public highway "by then and there manufacturing a rail fence across said road," sufficiently describes the offence of obstructing a public highway. *Jeffries et al. v. McNamara, 142*
10. *Constitutional Law.—Indictment.*—In the act (2 G. & H. 455) defining what shall constitute combining for the purpose of committing a felony, and fixing penalties therefor, the proviso that it shall not be necessary in the indictment to charge the particular felony which it was the purpose or object of the persons combining to commit, is unconstitutional, against natural law, and void. *Landringham v. The State, 186*
11. *Conspiracy.—Robbery.—Pleading.*—The averments of an indictment for combining to commit a robbery should be as specific and full in describing the robbery as in an indictment for that felony; and to charge a combining for the purpose of taking from the person forcibly and feloniously is not sufficient, but it is necessary, also, to allege that it was to be done "by violence" or "putting in fear." *Ib.*
12. *Same.—Overt Act.*—It is well settled that, to constitute the offence of conspiracy, it is not necessary that any act should be done in pursuance of the conspiracy. *Ib.*
13. *Indictment.—Receiving Stolen Goods.*—An indictment charging that the defendant did feloniously buy, receive, conceal, and aid in the concealment of certain property, belonging to certain persons named, which, prior to the time it was so bought, etc., had been feloniously stolen, etc., by some person unknown, the defendant, at the time he so bought, etc., the same, well knowing that the property had been stolen, is good, though it does not show the time when it was stolen, and that it was the subject of larceny at the time it was so received. *Kaufman v. The State, 248*
14. *Alibi.*—If the evidence touching an *alibi* is sufficient to raise a reasonable doubt of the guilt of the accused, it should be considered, although the *alibi* does not cover the whole time during which the crime was committed. *Ib.*
15. *Evidence.—Falsely Personating Another.*—To sustain an indictment under section 26, 2 G. & H. 445, the evidence must show that the money or property obtained by falsely personating another was intended to be delivered to the party personated. *Williams v. The State, 367*
16. *Same.—Larceny.—Will not Lie for Obtaining Money by False Representations.*—An indictment for larceny cannot be sustained, under section 19, 2 G. & H. 442, where the evidence shows that the defendant assumed the name of another person and falsely represented himself to be the person whose name he assumed, and on the faith of such representation obtained the money or property alleged to be stolen. *Ib.*
17. *Corrupt Agreement with Prosecuting Attorney.*—Where two or more informations are pending against the same person for unlawful sales of intoxicating liquors, an agreement between the defendant and the prosecuting attorney, that if the defendant will plead guilty to one of the informations, the fine shall only be of a certain amount, and the other information shall be dismissed, and the defendant's permit shall not be for-

feited, is a corrupt agreement, and the defendant who is misled by thus corruptly purchasing his indulgence, is not entitled to relief.

Golden v. The State, 424

18. *Motion for New Trial.—Newly-Discovered Evidence.*—On a conviction for an illegal sale of intoxicating liquor to one B., a motion for a new trial on the ground of newly-discovered evidence, in this, that one C. deceitfully and fraudulently brought about the alleged violation of law by purchasing the liquor, etc., is bad. *Rater v. The State*, 507
19. *Same.*—The fact that a party was deceived into a violation of law by one who was employed as a detective will not be a justification. *Ib.*
20. *Appeal from Justice of the Peace.—Arraignment.*—Where a defendant in a prosecution commenced before a justice of the peace for selling intoxicating liquor to an intoxicated person had been arraigned upon the affidavit before the justice, and had pleaded not guilty thereto, and had been tried and convicted, upon appeal by him to the circuit court further arraignment and plea were unnecessary. *Eisenman v. The State*, 520
21. *Incest.—Step-Mother and Step-Son.*—Under the statute, 2 G. & H. 452, sec. 45, to constitute the crime of incest from sexual intercourse between a step-mother and her step-son, they must each have had knowledge of their relationship, and the indictment must show such knowledge. *Baumer v. The State*, 544
22. *Same.*—The crime in such case is a joint one, and must be so charged, and one of the parties cannot be legally guilty unless the other is also guilty. They may be tried separately, and one may be convicted and sentenced before the other is tried. If one is acquitted, the other must be discharged, and the acquittal of one may be pleaded in bar of a prosecution against the other. *Ib.*
23. *Instruction.—Grand Larceny.—Value of Property.*—On the trial of a defendant indicted for grand larceny, where the value of the property is clearly proved, so as to preclude any question whether the crime is grand or petit larceny, it is not necessary to instruct the jury specially as to the value of the property. *Jones v. The State*, 549
24. *Instruction.*—An instruction which states the law correctly, as far as it goes, will not be held erroneous for not stating other propositions of law applicable to the case, there being no special request for further instructions, unless the instructions already given are left in such form as to mislead the jury as to the whole law applicable to the case. *Ib.*
25. *Same.*—Where an instruction in a criminal cause expressly informs the jury that they cannot convict, unless the guilt of the defendant is proved beyond a reasonable doubt, a failure to use the same language in another instruction will not be error. *Ib.*
26. *Possession of Stolen Property.*—The law imposes upon one who is found in the exclusive possession of property recently stolen the duty of accounting for or explaining how he came into possession of such property, and his failure, when required to speak, to give a satisfactory account of how he came into possession, or the giving of a false account, raises a presumption that such person is the thief. This presumption may be overcome by direct evidence showing that the person accused honestly came into possession, or by the attending circumstances, or by the good character and habits of life of the accused. *Ib.*
27. *Same.—Evidence.*—Where a person having stolen property in his possession bases his defence upon the ground that he purchased the property alleged to have been stolen, of a stranger, and paid him therefor in cash, evidence showing that the accused actually had the money to pay for the property is admissible. *Ib.*
28. *Indictment of Two Counts.—General Finding.*—Where there are two counts in an indictment, under one of which, if the defendant be found guilty, the fine would be greater than under the other, and the verdict is gen-

eral, and the fine assessed is the lowest that could be assessed under the indictment, the defendant cannot complain because the verdict does not show under which count he was found guilty. *Taylor v. The State*, 555

DAMAGES.

See DEMURRER TO EVIDENCE, 1; EVIDENCE, 11, 12; MALICIOUS PROSECUTION, 8; PLEADING, 13; SUPREME COURT, 8.

DECEDENTS' ESTATES.

See EXECUTOR AND ADMINISTRATOR.

1. *Administrator as Mortgagee.—Duties and Disabilities of.—Widow.*—An administrator, holding a mortgage on the lands of his decedent, foreclosed his mortgage and purchased the lands at sheriff's sale, pending his petition in the proper court to sell all but the widow's interest in said lands to pay the debts of the estate, there being no other liens against the lands, and the personal estate, with the two-thirds of the lands, being ample to pay all the debts.
Held, that the widow could avoid the sale. *Hunsucker v. Smith et al.*, 114
2. *Administration.*—The personal estate of a decedent is the primary fund for the payment of debts, unless a different provision be made by the will of the decedent. *Ib.*
3. *Same.—Widow's Rights.*—A widow who joined with her husband in his lifetime in a mortgage of his lands has a right to have the personal estate and the residue of the decedent's real estate applied, as far as applicable, to the payment of the mortgage debt, before her interest, as widow, in such lands is subjected to sale. *Ib.*

DEFAULT.

See PRACTICE, 11 to 15.

DEMURRER.

See NEW TRIAL, 3; PLEADING, 13, 14, 17; PRACTICE, 19; SUPREME COURT, 6, 7.

Practice.—When a demurrer has been filed and overruled, and the record does not contain the demurrer, it will be presumed that it was overruled on account of its own defects, or that it presented some objections to the pleading to which it was not liable.

Comer et ux. v. Himes et al., 482

DEMURRER TO EVIDENCE.

1. *Assessment of Damages.*—Damages need not necessarily be assessed before a decision on the question of law presented by a demurrer to evidence, but may be assessed afterward, if necessary.
Holmes v. The Phoenix Mut. Life Ins. Co. et al., 356
2. *Demurrer to Evidence May be Withdrawn.*—After a party has filed a demurrer to evidence, and before any joinder therein, it is within the discretion of the court to permit the demurrer to be withdrawn. *Ib.*

DEPARTURE.

See PLEADING, 4, 5.

DEPOSITION.

See SUPREME COURT, 3.

1. *Agreement to Read Deposition in Evidence.*—Where the deposition or sworn

- statement of a witness purports to have been taken "to be read in evidence (subject to all legal exceptions) in lieu of an oral examination," it may be read in evidence, though the witness reside in the county and be able to attend court. *McMullen et al. v. Clark*, 77
2. *Motion to Suppress Deposition*.—A motion to suppress a deposition, because the names of the parties are not properly indorsed on the envelope, cannot be made after the publication of the deposition. *Lingenfelter et al. v. Simon et al.*, 82
 3. *Same*.—Where a party appears at the time and place given in a notice to take depositions, and consents that they may be taken at another place, he cannot afterward object that they were not taken at the place named in the notice. *Ib.*
 4. *Same*.—If a deposition shows that the taking was adjourned from day to day, without assigning any cause, where the notice provided for adjournments, a party who appeared at each adjournment without objection cannot afterward object. *Ib.*
 5. *Same*.—Parties are not injured by, nor can they complain of, questions and answers in a deposition that tend to sustain their theory of the case. *Ib.*

DISTILLER'S LICENSE.

See MALICIOUS PROSECUTION, 3.

DIVORCE.

See PARENT AND CHILD, 1, 2.

DRAINING ASSOCIATION.

1. *Pleading.—Complaint to Recover Assessment*.—A complaint to recover an assessment against lands, for the construction of a ditch, under the act of March 11th, 1867 (3 Ind. Stat. 228), must show a substantial compliance with all the requirements of the statute; and the sufficiency of the complaint cannot be determined by looking to the petition filed with the complaint. *Combs v. Etter*, 535
2. *Same*.—Such complaint must show that the appraisers were residents of the county, and not of kin to any of the parties. *Ib.*

DURESS.

1. A promise extorted by terror or violence, whether on the part of the person to whom the promise or obligation is made or that of his agent, may be avoided on the ground of duress. *Bush v. Brown*, 573
2. *Same*.—If a party execute an instrument from a well grounded fear of illegal imprisonment, he may avoid it on the ground of duress. *Ib.*
3. *Same*.—To a suit upon a promissory note, it is a good answer to allege that the plaintiff induced the defendant to go with him to a secluded place, and there accused the defendant of having performed an abortion upon the plaintiff's wife, and that a certain person who was then present was an officer, having power to arrest and imprison the defendant, and that the plaintiff there threatened the defendant with immediate arrest and imprisonment, unless the note in suit was made, and fearing such arrest the defendant made the note, and that he had never committed the crime charged. *Ib.*

ESTOPPEL.

See HUSBAND AND WIFE, 2.

1. *Promissory Note.—Trustee of an Express Trust*.—Where the payee of a promissory note brought suit upon it in his own name, and

the note on its face showed that it was for the use and benefit of another, and it was objected that the plaintiff was not the real party in interest, and he failed to amend his complaint by showing that he was the real owner of the note, and on appeal to the Supreme Court it was held that he was the trustee of an express trust, and in that capacity had a right to maintain the action, he could not afterward, in a proceeding to set off, against the judgment on the note, a judgment held by the maker of the note against the person for whose use and benefit the note was given to said payee, be allowed to plead that the note was really his own and free from any trust.

Heavenridge v. Mondy et al., 434

2. *Mortgage.—Junior and Senior Mortgage.—Right to Redeem.*—A. conveyed certain real estate to B. and took from him a mortgage to secure unpaid purchase-money. B. thereafter conveyed the real estate to C. by a warranty deed and took from him a mortgage to secure two thousand dollars of unpaid purchase-money. B. then assigned the notes and mortgage made by C. to D., who then assigned the same notes and mortgage to E. Thereafter, A. sued to foreclose the mortgage made by B., and a judgment for three hundred and twenty-seven dollars and forty cents, and a decree of foreclosure, were obtained. C. was not a party to the suit, though his deed was of record. The real estate was sold, by virtue of the decree, for three hundred and ninety-four dollars and twenty-nine cents, to F., who thereafter assigned his certificate to E., who procured a deed for the property. Afterward, E. sued C. on the notes and mortgage made by C. to B., and C. succeeded in preventing a recovery by E., and obtained judgment in his own favor, on the ground of the former foreclosure of the mortgage held by A., and the sale of the real estate and the ouster and dispossession of C., and the consequent failure of the consideration for which he made his notes and mortgage to B. Subsequently, C. brought suit to redeem the real estate from the sale in favor of A., but did not offer to redeem from the mortgage and notes made by C. to B. E. set up the judgment in his case against C. as an estoppel against his claim to redeem.

Held, that C., not having been made a party to the suit of A. against B., had a right to redeem from such sale, but he abandoned his right, and became estopped from redeeming, by his failure to exercise such right until after he defeated the action of E., on the junior mortgage, on the ground of the failure of the consideration for which he had made the notes and mortgage, by reason of the foreclosure and sale on the mortgage of A.

Brent v. Oyler et al., 453

EVIDENCE.

See CONSIDERATION, 4; CRIMINAL LAW, 4, 5, 6, 15, 16, 26, 27; DEMURRER TO EVIDENCE; DEPOSITION; INNKEEPER, 1; JUSTICE OF THE PEACE, 3, 4; PARTNERSHIP, 4, 5; PLEADING, 15; PRINCIPAL AND AGENT, 1; PROMISSORY NOTE, 10; SUPREME COURT, 1, 2, 15.

1. *Verbal Admissions.—Weight of.*—Imperfection of memory is not the only infirmative circumstance to be considered in weighing the force of verbal admissions.
McMullen et al. v. Clark, 77
2. *Promissory Note.*—A witness may be asked to describe a note, for the purpose of identifying it, and such question will not call for the contents of the note.
Lingenfelter et al. v. Simon et al., 82
3. *Married Woman.—Chattel Mortgage.*—A chattel mortgage alleged to have been made by a married woman and her husband, which is set out as an exhibit in a complaint for its foreclosure, and which is not denied under oath, may be read in evidence against the wife, without its execution having been proved.
Keller et al. v. Boatman, 104
4. *Same.—Mortgage of Real Estate.*—So also may a mortgage made by a husband and wife upon the real estate of the husband be read in evidence

- against the wife, under like circumstances, without proving its execution. *Ib.*
5. *Witness.—Cross-Examination.*—The cross-examination of a witness must be limited to the matters about which he has testified in chief. *The T., W. & W. R. W. Co. v. Harris*, 119
6. *Same.—Impeachment.*—Where a witness, on cross-examination, is asked certain questions as a foundation for impeachment, and it is proved by another witness that he had made certain material statements denied by him, he may be recalled and permitted to explain the nature, circumstances, meaning, and design of what he is proved elsewhere to have said, but perhaps not merely for the purpose of again denying the making of the statements imputed to him, though this will not be sufficient cause for the reversal of the judgment. *Ib.*
7. *Hearsay.—Husband and Wife.*—Where the question was as to whether a certain sum of money delivered by a person to his son-in-law, for which the latter gave his note to the former, was a loan to said son-in-law or an advancement to his wife, a daughter of the payee of the note, since deceased, a witness was allowed, over objection, to testify that, after the making of the note and receipt of the money by said son-in-law, the latter told the witness that when he got the money he took it right home and handed it to his wife and said, "there is your money." *Held*, that his evidence was hearsay, and not admissible as the declaration of an agent, and that the judgment could not, in disregard of the error in its admission, be affirmed on other evidence. *Vandivere et al. v. Dollins et al.*, 216
8. *Telegraph Despatch.—Secondary Evidence.*—In an action against a telegraph company for damages for failure to transmit a despatch, the original despatch delivered to the operator must be given in evidence, or if not its absence must be properly accounted for before secondary evidence thereof can be admitted. *The West'n Un. Tel. Co. v. Hopkins*, 223
9. *Witness.—Impeachment.—Parties.*—Where a plaintiff who had testified as a witness was squarely contradicted by a witness for the defendant, and the plaintiff in rebutting impeached the defendant's witness, by showing that he had made statements out of court different from those testified to on the trial, after which the defendant introduced evidence to show that the character of his witness for morality, truth, and veracity was good, it was not an abuse of the discretion of the court to then allow the plaintiff to prove his general character for morality and truth and veracity to be good. *Fisher v. Hamilton*, 341
10. *Advancements.*—Where a father, in his lifetime, conveyed lands to two of his sons, and after his death they were claimed by the widow and other heirs to have been conveyed as advancements, a conversation with the father several months subsequent to the making of the conveyances, concerning the alleged advancements, is inadmissible in evidence against the sons. Such conversation is inadmissible unless it occurred before or at the time of the transaction, or so immediately subsequent thereto as to become a part of the *res gestæ*. *Woolery v. Woolery*, 29 Ind. 249, and *Hamlyn v. Nesbit*, 37 Ind. 284, so far as they conflict with this opinion, are overruled. *Harness et al. v. Harness et al.*, 384
11. *Appropriation of Land for Street.—Opinion of Witness as to Damages.*—On the trial of a proceeding by a city to condemn certain land for the purposes of a street, it is improper to ask a witness the value of the strip of land appropriated, considered with reference to the manner the appropriation affected the remainder of the land. *The City of Logansport v. McMillen*, 493
12. *Same.*—The opinion of the witness as to the value of the land appropriated may be taken, but the damage to the residue cannot be proved

by the opinions of witnesses; the facts, circumstances, and situation may be shown, and from them the jury may estimate the damages. *Ib.*

EXECUTOR AND ADMINISTRATOR.

See DECEDENTS' ESTATES, 1, 2; GUARDIAN AND WARD, 1; SHATTO v. SHELDEN, 220.

1. *Costs.*—By section 784 of the code, an administrator is not personally liable for costs in an action prosecuted by him in his fiduciary capacity.
Cavanaugh, Adm'r, v. The T., W. & W. R. W. Co., 149
2. *Sale of Real Estate.—Incumbrances.*—When a court orders the sale of real estate by an executor or administrator, unless otherwise ordered by the court, he sells and conveys the land subject to all incumbrances.
Martin, Guardian, v. Beasley, 280
3. *Deceased Judgment Creditor.—Execution.—Revival of Judgment.*—The administrator of a deceased judgment creditor may have execution upon the original judgment without a revivor; but he may have it revived.
Armstrong v. McLaughlin, 370
4. *Two Administrators Making One Bond.—Each Surety for the Other.*—Where two persons, administrators of the same estate, join in executing a bond with others as their sureties, for the faithful discharge of their duties, each of such administrators will be held as surety for the other. BUSKIRK, J., dissented. *Moore v. The State, ex rel. Atkinson et al., 558*
5. *Same.*—An agreement made by one of such administrators, by which a part of the heirs relinquish all further claim to the estate, will not release him as surety for the other administrator. *Ib.*
6. *Heirs not Entitled to Estate Until Claims are Paid.*—Where there are claims against an estate, in a suit on the relation of the heirs upon the bond of the administrator, it is proper for the court to direct that the amount received be retained by the clerk until the further order of the court. *Ib.*

FEEES AND SALARIES.

See COUNTY TREASURER, 1.

FOREIGN JUDGMENT.

See ALIMONY.

FORGERY.

See CRIMINAL LAW, 1.

FRAUD.

See PLEADING, 8, 9, 10, 20, 21; PRINCIPAL AND SURETY, 3 to 6; STATUTE OF FRAUDS, 2.

1. *False Representations to Induce Execution of Deed.—Husband and Wife.*—Representations made by a second wife to her husband, who was of sound though feeble mind, that a certain person intended to bring a slander suit against him, and that his property would be swept away, that his children had turned against him, and were conspiring to deprive him of his property, and that she alone was true to him, and that his granddaughters were of bad character and not fit to be entrusted with his property, were not sufficient to set aside a deed made by the husband, by which his property was vested in said wife.
Jagers et al. v. Jagers, 427
2. *Same.*—Misrepresentations that will constitute fraud must be concerning a material fact, and not merely the expression of an opinion or a representation concerning matters equally within the knowledge of both parties. *Ib.*

GUARDIAN AND WARD.

See *SANDERS v. THE STATE, EX REL. BUCHER*, 228.

1. *Order Against Guardian Without Notice*.—An order made by a court without notice to a guardian, requiring him to pay a debt claimed to be due from him or his ward, as to pay taxes on land of his ward's ancestor, sold by the administrator of the said ancestor's estate, is void.
Martin, Guard., v. Beasley, 280
2. *Same.—Summary Proceeding*.—Upon failure of the guardian to comply with such an order, a citation to him to appear *instantly* and render an account of his proceedings in the guardianship is illegal and unprecedented. *Ib.*

GUARDIAN OF INSANE PERSON.

See *INSANE PERSON*.

HIGHWAY.

See *CRIMINAL LAW*, 9.

1. *Establishment by User*.—To entitle a public highway, established by use for twenty years or more, to be entered of record, it should be ascertained and described with the same certainty that would be necessary in establishing a highway originally.
Stephenson et al. v. Farmer et al., 234
2. *Same*.—If the evidence shows that the road was never surveyed or worked by authority, and that the track was continually changed to accommodate fields and to go around obstructions, it will be insufficient. *Ib.*

HOUSE OF REFUGE.

1. *Board of Commissioners.—Rules and Regulations*.—The board of commissioners of the house of refuge for the correction and reformation of juvenile offenders, with the approval of the Governor, have power to make rules and regulations in regard to the admission of offenders, so as to require a letter of application giving proper information in regard to the infant whose admission is asked, and also an examination by a respectable medical practitioner as to the physical and mental condition of such person; and the superintendent may refuse to receive an offender until such rules are complied with.
Ainsworth v. The State, 562
2. *Same.—Contempt*.—The refusal to admit a boy charged with a criminal offence, and ordered to be committed to said institution by the judge of a court, until such rules are complied with, is not a contempt of court. *Ib.*

HUSBAND AND WIFE.

See *EVIDENCE*, 3, 4, 7; *FRAUD*, 1.

1. *Married Woman.—Contract.—Set-Off*.—When a married woman receives money on a parol contract for the sale of her lands, but fails to convey, a personal action cannot be sustained against her to recover the money so paid; nor can it be made a matter of set-off in an action on a promissory note brought by such married woman against the party who has paid such money.
Sanford et al. v. Wood, 165
2. *Judgment.—Estoppel by.—Married Woman*.—A mortgage was executed by the owner of certain real estate, in which his wife did not join. The mortgage recited that it was given to secure the purchase-money of the land mortgaged. In a subsequent suit to foreclose the mortgage, the wife was made a party defendant with her husband, the mortgagor, and the complaint alleged that the mortgage was given for purchase-money.

All the defendants made default, and the court found the facts to be as charged in the complaint, and rendered judgment accordingly. The land was sold on the decree of foreclosure. Afterward, the mortgagor died, and his widow brought her action against the parties in possession under the sheriff's deed, for one-third of the land.

Held, that she was estopped by the judgment of foreclosure from asserting title and from controverting the fact recited in that judgment, that the mortgage was given for the purchase-money of the land. If the mortgage was not, in fact, given for purchase-money, she should have set up that defence in the foreclosure proceeding. *McCaffrey v. Corrigan et al.*, 175

3. *Mortgage.—Marriage of Female Mortgagor to Mortgagee.*—An unmarried woman executed a note and a mortgage on her real estate to secure its payment, and afterward married the payee of the note, the mortgagee, who, after the marriage, assigned the mortgage and delivered the note to a third person, who brought suit to foreclose the mortgage.

Held, that, by the marriage, the debt and mortgage were discharged, and the action could not be maintained. *Long v. Kinney*, 235

4. *Widow.—Real Estate of Deceased Husband.—Judgment Lien Attached Before Marriage.*—The widow of a judgment defendant, who married him after the lien of the judgment attached, has no claim by virtue of her marriage to real estate sold to satisfy the judgment, and this will be the case, though the original judgment was revived by the administrator of the deceased judgment creditor after the marriage, and the real estate sold after such judgment was revived, ten years not having elapsed after the original judgment was obtained, and before it was revived.

Armstrong v. McLaughlin, 370

5. *Proceedings to Subject Real Estate to Payment of Debt.*—A. bought certain real estate with a mill thereon of B., and caused it to be conveyed to the wife of A. Certain real estate of the wife of A. was given in part payment to B., and the notes of A. and wife secured by mortgage were given for the residue of the purchase-money. Before the notes were paid, the mill was burned, and thereafter the real estate was reconveyed to B., who accepted it as part payment of the notes. A. and wife had no money or property wherewith to pay the balance. C., a brother of A. had assisted him in running the mill before it was burned, and on certain contingencies was to have become the owner of a part of it. The citizens and neighbors raised some money to aid in starting another mill. C. procured another tract of real estate on his own credit, and on the suggestion of those proposing to aid in the erection of the mill, conveyed one-half of it to the wife of A., and the two brothers, with the assistance given them and on their credit, erected a mill, each of them working in the erection and running of the same.

Held, that B. could not subject the latter real estate to the payment of the balance due on his notes. *Cooper et al. v. Ham et al.*, 393

6. *Agency of Husband.*—A wife may employ her husband to act as her agent in operating a mill owned by her, and such employment is not proof of an attempt on her part to defraud his creditors. *Ib.*

7. *Same.*—The husband in such case has the right to give his personal services and skill to the management of his wife's property without any other compensation than the support and maintenance of himself and family. *Ib.*

INCEST.

See CRIMINAL LAW, 21, 22.

INJUNCTION.

See RAILROAD, 3; TURNPIKE, 3.

Appeal.—City.—A party cannot enjoin the collection of a fine and costs,

assessed for the violation of a city ordinance, on the ground of there being no offence charged or cause of action filed before the mayor. The remedy in such case is by appeal.

Schwab v. The City of Madison et al., 329

INNKEEPER.

1. *Pleading.—Evidence.*—In an action based upon the common law liability of an innkeeper, brought by a guest, to recover for money and a watch stolen from the guest while sleeping in his room, where the circumstances tended to show that the theft was committed by another guest who was admitted to the room without the knowledge of the plaintiff, and while the latter was sleeping, it was erroneous to admit evidence in chief of an agreement between the plaintiff and the innkeeper's clerk that no one except A., then occupying the room, and the plaintiff would be admitted to said room during the night, such agreement not being stated in the complaint. It was also error to admit evidence of a like promise made to A. to which the plaintiff was not a party.

Baker v. Dessauer, 28

2. *Liability of.*—An innkeeper is *prima facie* liable to a guest for loss or damage to the goods of the latter, but he may exculpate himself by proof that the loss did not happen through any neglect or fault on his part, or that of his servants, for whom he is responsible.

Ib.

INSANE PERSON.

Guardian.—Attorney's Fees.—Under the fifth section of the act of May 29th, 1852, 2 G. & H. 573, relating to insane persons and the appointment of guardians, etc., the guardian of an insane person may be required to pay an attorney, employed by the children of such insane person to prosecute the proceeding in which such person was adjudged insane and said guardian was appointed, for services rendered under such employment.

Brownlee v. Switzer, Guard., 221

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 23, 24, 25; MALICIOUS PROSECUTION, 7, 8.

1. *Questions of Fact and Law.*—On the trial of an indictment for assault and battery, the court charged the jury that a policeman's mace, with which the blow was struck, was a dangerous weapon.
Held, that the charge was erroneous. Whether the weapon used was or was not dangerous, was a question of fact, and not of law, and should have been submitted to the jury.
2. *Motion for New Trial.*—The assignment, as a ground for a new trial, of the refusal of a certain instruction asked, and the giving of oral instructions, does not include an objection to an oral modification of the instruction asked.
3. *Criminal Law.*—Giving an instruction, by its terms applicable to several defendants, but bad as to any one of them, is error.
4. *Improper Use of the Word "Testimony."*—Where the court, in an instruction, states to the jury the law arising upon certain facts, if they should be satisfied, from a fair preponderance of the "testimony," that such facts exist, it will not be presumed that the improper use of the word "testimony" has misled the jury.

Dœring v. The State, 56

McMullen et al. v. Clark, 77

Jeffries et al. v. McNamara, 142

Fisher v. Hamilton, 341

INTERROGATORIES TO JURY.

1. *Written Instrument.—Construction of for the Court.*—It is the duty of the court to construe written instruments affecting the rights of parties,

where there is no ambiguity, and an interrogatory submitting such question to the jury should not be propounded.

Comer et ux. v. Himes et al., 482

2. *Uncertainty of Special Finding.*—Where the special finding of a jury, on account of the language of an interrogatory and the answer thereto, is so uncertain that the meaning cannot be definitely ascertained, such special finding will not warrant the court in disregarding the general verdict, and rendering judgment on the special finding. *Ib.*

JOINT DEBTORS.

See PARTNERSHIP, 2, 3.

JUDGMENT.

See ALIMONY ; EXECUTOR AND ADMINISTRATOR, 3 ; HUSBAND AND WIFE, 4 ; JUSTICE OF THE PEACE, 1 ; PLEADING, 2 ; REPLEVIN, 2 ; REVIEW OF JUDGMENT ; SURETY OF THE PEACE, 1.

Form. See SUPREME COURT, 9.

Estoppel. See HUSBAND AND WIFE, 2.

1. *What Necessary to Constitute a Judgment.*—Where lands were assessed with benefits for the construction of a gravel road, and the owner appealed to the circuit court, where the assessment was reduced, and certain sums were ordered to be assessed against certain tracts of land, and other tracts were ordered to be released from assessment, and the action of the court was ordered to be certified to the county auditor, with directions to correct the tax duplicate, to correspond with the assessment made by the court ;
Held, that such orders of the court did not constitute a judgment upon which execution could be issued. *Needham v. Gillaspie et al.*, 245
2. *Same.*—To constitute a valid judgment, the word "recover" should be used, and the amount of recovery should be stated, where a money judgment is rendered ; and in other cases appropriate words should be used, having reference to the relief granted. *Ib.*
3. *Record.—Conclusiveness of as to What was Tried.*—Where the record in a cause tried shows what was found and adjudged by the court, a party cannot allege and prove in a collateral proceeding, that such matters were not determined. *Landers et al. v. George et al.*, 309

JURISDICTION.

1. *Superior Court.—Statute Construed.*—The Superior Court of Marion county has no jurisdiction of a suit by the State of Indiana, on the relation of the Auditor of State, against the board of commissioners of Vanderburgh county for uncollected state taxes, under section 269 of the act of December 21st, 1872, Acts 1872, p. 57.
The State, ex rel. Wildman, Aud. of State, v. B'd of Comm'rs Vanderburgh Co., 457
2. *Same.*—The words, "in any court of this State," as used in said statute mean in any court of this State having competent jurisdiction. *Ib.*

JUSTICE OF THE PEACE.

See AMENDMENT, 1 ; ARREST, 2, 3 ; CRIMINAL LAW, 20 ; LIQUOR LAW, 16 ; PRACTICE, 2.

1. *Judgment.*—An entry on the docket of a justice of the peace, showing that the defendant was tried, "and, after hearing the evidence, was fined in the sum of twenty-five dollars and costs of suit," does not show a judgment, or authorize the commitment of the defendant.
Jeffries et al. v. McNamara, 142
2. *New Trial.*—A new trial cannot be granted by a justice of the peace, on account of newly-discovered evidence, after the expiration of four

days from the entering of judgment. Sec. 356, 2 G. & H. 215 is not applicable to courts of justices of the peace.

Vogel v. The Lawrenceburgh Tobacco Manuf'g Co., 218

3. *Transcript.—Authentication.*—A certificate of a justice of the peace to a transcript from his docket, that it is a true and correct transcript of the proceedings had before him in the cause, together with a true copy of all the papers in the case, given under the hand and seal of the justice, without the certificate and seal of the clerk of the county, is a sufficient authentication to entitle the transcript to be received in evidence in the several courts of this State. *Fisher v. Hamilton*, 341

4. *Evidence.*—Parol evidence that a person acted as a justice of the peace is admissible to prove him to be such officer, and the authenticity of his jurat may also be proved by parol. *Ib.*

LANDLORD AND TENANT.

See REPLEVIN, 4; USE AND OCCUPATION, 1, 2.

Covenant to Repair.—Lease of Water-Power.—In a lease of water-power, as in other leases, no covenant by the lessor to repair will be implied, where none is expressed. *Skillen v. The Water-Works Co. of Ind'polis*, 193

LARCENY.

See CRIMINAL LAW, 15, 16, 23.

LIQUOR LAW.

See CRIMINAL LAW, 18; VANGORDEN *v.* THE STATE, 518.

Place of Sale. See WERNEKE *v.* THE STATE, 202.

Sale to one in the habit of getting intoxicated; knowledge of seller. See WERNEKE *v.* THE STATE, 210.

1. *Liquor Law of 1873.—Instruction.—Limitation.*—In a prosecution for selling intoxicating liquor in violation of the act of February 27th, 1873, the court instructed the jury that if the sale was made "within two years prior to April 24th, 1874," they should convict.

Held, that the instruction was erroneous. *Hurney v. The State*, 203

2. *Same.—Tenth Section.—Affidavit.*—In a prosecution, under the tenth section of the liquor law of 1873, for a sale of liquor after nine o'clock in the evening, it is necessary to allege that the liquor was sold to be drank on the premises where it was sold. *Layton v. The State*, 229

3. *Same.—Sale of Intoxicating Liquor on Sunday.*—Section 10 of the act in reference to the sale of intoxicating liquors, Acts 1873, p. 151, created no offence. It simply limited the license to sell under a permit granted under section 1, by excepting from its protection all sales made on Sunday and on other days and times mentioned in said section. (DOWNEY, J., and BUSKIRK, C. J., dissented.) *Beardsley v. The State*, 240

4. *Act of 1875.—Proviso of Seventeenth Section.*—By the seventeenth section of the liquor law of March 17th, 1875, it is provided, "that no prosecution shall be instituted or maintained against any person for any violation of the provisions of this act occurring between the time when it shall take effect and the close of the first regular session of the board of commissioners of the proper county, the beginning of which session not taking place in less time than four weeks after this act shall have taken effect."

Held, that, if this proviso be void, there is no valid law making the selling, within the time excepted by the proviso, of intoxicating liquor in a less quantity than a quart at a time, without a license, to be drank at the place where sold, an offence; so that, whether it be valid or void, an

indictment for so selling on the 6th of April, 1875, was properly quashed. *The State v. Elff*, 282

5. *Liquor Law of 1873.—Sixth Section.*—Under the sixth section of the act to regulate the sale of intoxicating liquors (Acts 1873, p. 151), it is unlawful to sell, barter, or give intoxicating liquors to any person in the habit of becoming intoxicated, and such person need not be intoxicated at the time the liquor is furnished. *Fountain v. Draper*, 441
6. *Same.—Twelfth Section.—Suit by Wife for Damages.—What She Must Establish.*—In a suit brought by a wife under the twelfth section of the act to regulate the sale of intoxicating liquors (Acts 1873, p. 151), it is necessary, in order to entitle her to recover, to establish the following: 1. The intoxication of her husband, habitual or otherwise. 2. That she has been injured in person or property, or means of support, in consequence of such intoxication. 3. That the intoxication from which the injury resulted was caused, in whole or in part, by the selling, bartering, or giving of intoxicating liquors to her husband by the defendant. *Ib.*
7. *Same.—Liability for Damages.*—Each person who by selling, bartering, or giving intoxicating liquors, contributed in part to the intoxication causing the injury complained of, is liable for the full extent of the injury and all such persons may be joined, or any one may be sued. *Ib.*
8. *Suit on Bond Given by Person Holding Permit to Sell Intoxicating Liquor.*—The damages which may be recovered in an action upon a bond executed in conformity to the third section of the act to regulate the sale of intoxicating liquors (Acts 1873, p. 151), must have been suffered by or inflicted upon some person by reason of the sale of intoxicating liquor by the person receiving a permit under said act, his agent, or employes. *Schafer et al. v. The State, ex rel. Cox*, 460
9. *Same.—Pleading.*—The complaint in such case must aver that the injury complained of and the damages sought to be recovered resulted in consequence of a sale of intoxicating liquors. *Ib.*
10. *Same.*—An averment in such complaint, that whilst A. was intoxicated, by reason of liquor sold him by the person holding the permit, he inflicted a mortal wound on the husband of the plaintiff, causing his death, does not sufficiently show that the mortal wound was inflicted by reason of the intoxication of A. *Ib.*
11. *Same.*—A complaint in such case, which avers that the intoxication was caused in part by liquor sold by the holder of a permit, and that while the purchaser was so intoxicated, and by reason of such intoxication, he inflicted the mortal wound, etc., is bad. *Ib.*
12. *Sale of Liquor to be Drank on the Premises.*—Where intoxicating liquor is sold in ordinary beer glasses, carried from the room, and drank on the lot belonging to the premises, and the glasses are returned, it will be presumed to have been a sale of liquor to be drank on the premises. *Rater v. The State*, 507
13. *Same.—Information.*—In an affidavit or information for selling intoxicating liquor to be drank upon the premises where sold, under the act of February 27th, 1873, it is not necessary to allege that the liquor was drank on the premises, or that it was drank anywhere. *Eisenman v. The State*, 511
14. *Same.*—Where there is an enclosure in the rear of, and in view of, a place where intoxicating liquors are sold, where persons can drink under the protection of a high fence, and where they are in the habit of drinking, and where liquor sold is delivered in vessels, and drank from glasses furnished by the person making the sale, and carried when bought in the direction of the enclosure, and the empty vessels are returned, it may be inferred that the liquor was sold to be drank on the

- premises, though the persons buying were told it must not be drunk on the premises. *Ib.*
15. *Evidence*.—Where one witness, who drank of liquor sold, testifies that in his opinion the liquor was intoxicating, and that it made him drunk, it will authorize a finding that the liquor was intoxicating. *Ib.*
16. *Justice of the Peace*.—A criminal prosecution may be maintained before a justice of the peace for selling intoxicating liquor to a person in the habit of getting intoxicated, in violation of the liquor law of 1873. *The State v. Lawrence*, 515
17. *Indictment*.—An indictment under the act of February 27th, 1873, to regulate the sale of intoxicating liquors (Acts 1873, p. 151), alleging that the sale was made after the hour of nine o'clock P. M., need not aver that the defendant had a permit. Having a permit is no part of the offence, or description of the offence. *Crone v. The State*, 538
18. *Statute Construed*.—Section 10 of said act creates no offence independent of that defined in section 1, and the two sections must be construed together. *Ib.*
19. *Penalties*.—To an indictment for selling intoxicating liquor without a permit, the first penalty prescribed in section 14 of the act to regulate the sale of intoxicating liquors (Acts 1873, p. 151) is applicable, and the penalty prescribed in section 10 of said act is applicable to an indictment for selling with a permit, but within the interdicted hours. *Taylor v. The State*, 555
20. *Evidence—Defence*.—Under an indictment for selling intoxicating liquor to be drunk on the premises, without a permit, it is not necessary for the state to prove that the defendant had no permit. If the defendant had a permit, he may show it in defence. *Ib.*

MALICIOUS PROSECUTION.

1. *Probable Cause*.—If the plaintiff in an action for malicious prosecution was in fact innocent of the criminal offence with which he was charged, the defendant cannot defeat the action by showing that there was in fact probable cause, if he did not know of the existence of the facts constituting the probable cause at the time of making the charge. *Galloway et al. v. Stewart*, 156
2. *Same—Variance*.—The complaint alleged that the defendant, without probable cause, charged the plaintiff with having distilled spirits without license from the Government of the United States, and without having given the bond required by the laws of the United States. The affidavit on which the plaintiff had been prosecuted said nothing about the bond. *Held*, that the variance was not material. An offence was charged independently of the allegation of the failure to give bond. *Ib.*
3. *Distiller's License*.—The payment of the tax and the receipt therefor amount, in substance, to a license, and confer on the party a right to carry on the business for the time for which the tax has been paid, on complying with the law in other respects. *Ib.*
4. *Advice of Counsel*.—A defendant in an action for malicious prosecution cannot defeat the suit by proof that he acted on the advice of counsel, if there was any material fact not communicated to counsel, of which the defendant had knowledge, or which he could have known by the exercise of reasonable diligence. *Ib.*
5. *Surety of the Peace*.—An action will lie for having, without probable cause and maliciously, instituted a prosecution for surety of the peace. *Fisher v. Hamilton*, 341
6. *Pleading—Copy of Proceedings*.—In an action for malicious prosecution, filing with the complaint a copy of the proceedings in the case alleged to

have been prosecuted maliciously does not make such proceedings a part of the complaint. *Ib.*

7. *Instruction*.—Where the court, in an action for malicious prosecution, instructed the jury that the statute limited the maximum amount of damages that could be recovered to a certain sum, stating the amount claimed in the complaint;

Held, that the use of the word "statute" instead of "complaint" did not injure the defendant. *Ib.*

8. *Damages*.—In an action for malicious prosecution, an instruction to the jury that, in assessing damages, the jury might consider every circumstance of the act of arrest and prosecution, and also every act which injuriously affected the plaintiff, not only in his person, but also in his peace of mind and individual happiness, did not authorize the jury to consider circumstances and acts not directly connected with the arrest and prosecution of the plaintiff. *Ib.*

MANSLAUGHTER.

See CRIMINAL LAW, 2.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MISJOINDER.

See PRACTICE, 3, 4.

MISTAKE.

See PLEADING, 20, 21; REFORMATION OF INSTRUMENT, 2, 3.

MORTGAGE.

See DECEDENTS' ESTATES, 1, 3; ESTOPPEL, 2; EVIDENCE, 3, 4; HUSBAND AND WIFE, 2, 3; PARTNERSHIP, 10, 11, 12; REPLEVIN, 2.

1. *Pleading*.—*Foreclosure of Mortgage*.—*Recording of Mortgage*.—*Recorder's Certificate*.—A complaint to foreclose a mortgage on real estate against the grantee of the mortgagor, which alleges that the mortgage was recorded within ninety days after its execution, but does not allege where it was recorded, is bad on demurrer, and its insufficiency is not cured by the memorandum or certificate of the recorder on the copy of the mortgage filed with the complaint and referred to therein, which memorandum is no part of the complaint.

Faulkner et ux. v. Overturf, 265

2. *Chattel Mortgage*.—The fact that the possession of mortgaged personal property has been surrendered by the mortgagor to the mortgagee will not prevent a sheriff, holding executions in favor of other creditors of the mortgagor, from levying upon and selling the equity of redemption, until the mortgagee has, by legal notice and sale of the goods or by a judicial foreclosure and sale, cut off the equity of redemption.

Landers et al. v. George et al., 309

3. *Same*.—Where it is provided in a chattel mortgage that, in default of payment of the mortgage debt, the mortgagor shall deliver the property to the mortgagee, such delivery will not vest the absolute ownership of the property in the mortgagee or free the property from the equity of redemption. *Ib.*

MURDER.

See CRIMINAL LAW, 2.

NEGLIGENCE.

See PLEADING, 6; RAILROAD, 4; TELEGRAPH, 2, 3, 4.

Railroad.—Pleading.—Contributory Negligence.—A complaint against a railroad company to recover for an injury resulting in death, which showed that the deceased, in company with others, was voluntarily riding upon a hand-car, on the track of the defendant, in the night time, and thus collided with a locomotive and train of the defendant, was bad, because it showed contributory negligence on the part of the deceased.

Ream, Adm'r, v. The P., Ft. W. & C. R. R. Co., 93

NEW TRIAL.

See CRIMINAL LAW, 18; JUSTICE OF THE PEACE, 2; SUPREME COURT, 3.

1. *Motion.—Insufficient Complaint.*—A defect in the facts of a complaint does not constitute a reason for a new trial.

Kimberlin et al. v. Carter, 111

2. *Newly-Discovered Evidence.*—An application for a new trial on the ground of evidence discovered since the term at which the action was tried will not be granted, where the newly-discovered evidence is of the same kind given on the trial, and merely cumulative; or where such evidence is of facts not recollected by the party when testifying on the trial; or where such evidence could not change the result; but it should be granted where the newly-discovered evidence, although corroborative of evidence given on the trial, consists of admissions of the adverse party.

Humphreys v. Klick et al., 189

3. *Same.—Demurrer.—Bill of Exceptions.*—In an application for a new trial on the ground of evidence discovered after the term at which the trial was had, a demurrer to the complaint admits the original evidence and that newly-discovered to be as stated in the complaint, and no bill of exceptions is necessary to show what the evidence on the trial was. *Ib.*

4. *Excessive Damages.—Motion for New Trial.*—That the damages assessed by the court upon the trial were excessive, cannot be presented for the consideration of the Supreme Court, except by making it a reason for a new trial in the court below. *The West'n Un. Tel. Co. v. Hopkins*, 223

5. *Newly-Discovered Evidence.*—Where the cause assigned in a motion for a new trial is newly-discovered evidence, and it is not shown that the party making the motion had used diligence to discover the new evidence before the trial, the motion must be overruled. *Cook v. Hare et al.*, 268

6. *Motion.—Exclusion of Evidence.*—That "the court erred, on the trial of the cause, in excluding evidence offered by the plaintiff, to the exclusion of which the plaintiff excepted at the time," is too indefinite as a statement of a cause in a motion for a new trial. *Terry v. Deitz et al.*, 293

7. *Same.*—A motion for a new trial on the ground of the improper admission or exclusion of evidence, without designating the evidence admitted or excluded, is too indefinite.

Holmes v. The Phoenix Mut. Life Ins. Co. et al., 356

8. *Same.*—That the court erred in the conclusions of law stated upon the facts found, is no ground for a new trial. *Ib.*

9. *Partition.—New Trial as of Right.*—In a proceeding for partition between a widow and the heirs of her deceased husband, where certain lands conveyed by the husband to two of his sons are claimed by the sons to have been gifts, and by the widow and other heirs to have been advancements, on a decision adverse to the claim of the sons, they are not entitled to a new trial as of right. *Harness et al. v. Harness et al.*, 384

10. *Motion for New Trial.*—A motion for a new trial on the ground of the improper admission or exclusion of evidence, for the character and pur-

port of which reference is made to a bill of exceptions not then filed, is too uncertain and indefinite to present any question.

Cooper et al. v. Ham et al., 393

11. *Insufficient Excuse for not Producing Affidavit.*—On a motion for a new trial on the ground of newly-discovered evidence, it is not a sufficient excuse for not producing the affidavit of the witness, to say that the witness is interested adversely to the party making the motion.

Rater v. The State, 507

12. *Same.—Witness Compelled to Make Affidavit.*—On a proper application to the court, such witness may be required to make his affidavit. *Ib.*

13. *Motion for New Trial.—Evidence.*—Where the admission of evidence objected to is not assigned as a cause in a motion for a new trial, the ruling cannot be questioned in the Supreme Court.

Fromer v. The State, 580

OFFICIAL BOND.

See COUNTY TREASURER, 3; RELATOR, 2, 3, 4.

OFFICE AND OFFICER.

See COUNTY TREASURER, 2, 3.

1. *Township Trustee.—Term of Office.*—The power and authority of an outgoing township trustee ends when his successor is elected and qualified.

Everroad v. Flatrock T'p, 451

2. *Same.*—The term of office of an incoming township trustee commences when he is elected and qualified. *Ib.*

3. *Same.*—When a new township trustee is elected and qualified, the former, trustee is no longer an officer *de jure* or *de facto*. *Ib.*

4. *Contract.*—A contract made by an officer as such after he has been superseded by a successor is invalid. *Ib.*

PARENT AND CHILD.

1. *Custody of Child.—Unconditional Decree in Divorce Cause Conclusive.*—Where a divorce is granted, and the care, custody, and education of a minor child is given to one of the parties, without limitation as to time or reservation of power to change it, the decree is conclusive, even in a direct proceeding to modify or change it, as well as in all collateral proceedings. (DOWNEY and PERRY, JJ., dissented.)

Sullivan v. Learned et ux., 252

2. *Same.—Court May Reserve Power to Modify Decree.*—In decreeing a divorce, a court may retain the power to open, alter, and modify the decree, in reference to the care and custody of minor children, by expressly reserving the power, or by providing that the custody shall continue until the further order of the court. *Ib.*

3. *Services of Child.—Wages.—Father.*—The father is entitled to the services of his minor children, or to the proceeds of their labor, if they work for others, while they are supported by him.

Hollingsworth v. Swedenborg et ux., 378

4. *Same.—Mother.*—The mother has a right to the wages of her infant child, after the death of the father, so long as it remains a member of her family and is being provided for by her. *Ib.*

5. *Same.*—Where the mother of an infant daughter is married to a second husband, and the daughter does not live with the mother, and is not provided for by her, but is allowed to receive and appropriate to her own use the wages she earns, the mother cannot, in the absence of an express promise to pay her, recover such wages. *Ib.*

PARTIES.

See EVIDENCE, 9; RELATOR, 1 to 4; SUPREME COURT, 5.

PARTITION.

See NEW TRIAL, 9.

PARTNERSHIP.

1. *Promissory Note.—Presumption of Law.*—In a suit upon a promissory note, where the defendants are charged with having made the note sued on as partners by their firm name, and where the execution of the note is denied under oath, proof that the defendants so denying were partners with the other defendants at the time the note was made does not raise a presumption of law that the note is a firm note.
McMullen et al. v. Clark, 77
2. *Judgment Against One Partner.—Suit Against the Others.*—The recovery of a judgment against one partner bars an action against the other partners upon the same cause of action. *Lingenfelter et al. v. Simon et al.*, 82
3. *Execution of Note by One Partner.*—The execution of a note by one of several joint debtors does not operate as a satisfaction of the original debt, in the absence of an express agreement that it shall be received in full satisfaction. *Ib.*
4. *Evidence.—Secret Partner.*—In an action against partners, two of whom are alleged to be dormant, for goods sold to them, it is competent for the plaintiff to testify whether he was informed of the existence of the secret partners, and if so, when and how he received the information. *Ib.*
5. *Same.*—Where a letter is written, in the name of partners, by one employed to act for them, it is competent for them to show by whom and under what circumstances it was written. *Ib.*
6. *Promissory Note.—Evidence.*—In a suit upon a promissory note made in the name of a firm, where the execution of the note is denied, it is competent to show that in other transactions with other parties prior to the making of the note, one of the defendants had acquiesced in the use of his name by the other partner. *Ditts v. Lonsdale, Adm'r*, 521
7. *Same.—Liability of Partner.*—To render one liable as a partner on a promissory note, made by one partner in the firm name, it must appear that it was made in the partnership business, for the purposes of the partnership. *Ib.*
8. *Nominal Partners.*—Nominal partners are those who appear, or are held out to the world as partners, but who have no real interest in the firm or business. *Ib.*
9. *Same.*—Nominal partners are liable to third persons, notwithstanding they have no real interest in the firm or business. *Ib.*
10. *Mortgage.—Partnership Property Mortgaged by One Partner for Individual Debt.—Cross Complaint.*—In a suit to foreclose a mortgage on partnership real estate, made by one partner to secure his individual debt, creditors of the firm may be admitted as parties, and may file their cross complaint to subject the mortgaged real estate to the payment of the partnership debts, before payment of the mortgage debt; and they may do this whether the firm debts were contracted before or after the execution of the mortgage. *Conant v. Frary et al.*, 530
11. *Same.*—Where real estate held by the members of a partnership as partnership property is mortgaged by one of the partners to secure his individual debt, the mortgagee only acquires a lien upon what may be the share of the mortgagor after settlement of the partnership accounts and the payment of all partnership debts. *Ib.*
12. *Same.*—The creditors of an insolvent partnership are entitled to have

the partnership assets applied in satisfaction of their debts, in preference to the creditors of the individual partners, and this without regard to whether the partnership debts were contracted before or after the individual debts. *Ib.*

PAYMENT.

1. *Commercial Paper Made by One for Debt of Himself and Others.*—A party liable with others, on a promissory note, who, after default in payment, paid the original note by his own negotiable paper governed by the law merchant, may, before the payment of his note, sustain an action against the other parties to the original note for money paid, etc. *Keller et al. v. Boatman*, 104
2. *Voluntary Payment.*—Money voluntarily paid, with a full knowledge of the facts, cannot be recovered back. *Stedman et al. v. Boone*, 469

PLEADING.

See ARBITRATION AND AWARD, 2; CONSIDERATION, 1 to 4; INNKEEPER, 1; MALICIOUS PROSECUTION, 6; MORTGAGE, 1; NEGLIGENCE; PROMISSORY NOTE, 2, 3, 7 to 10; RAILROAD, 5; TELEGRAPH, 1.

1. *Muniment of Title.*—Where a defendant in a partition proceeding pleads by special answer a title derived through an executor's sale, and alleges a will which forms a muniment of his title, the terms of the will and of the order of the court, directing the sale of lands by the executor, should be so stated in the answer as to enable the court to determine their legal effect, or copies of them should be filed with the answer. *Young et al. v. Pickens et al.*, 23
2. *Complaint to Subject Real Estate to Satisfaction of Judgment.*—A complaint to set aside a credit entered on a judgment by reason of a sale of property on execution, which was not the property of the judgment debtor, and to subject certain real estate to the satisfaction of the judgment, is good, though the plaintiff may not be entitled to have the credit set aside, if it shows that there is still an amount due on the judgment over and above the credit. *Brunner et al. v. Brennan*, 98
3. *Answer to Part of Complaint.*—An answer pleaded to the whole complaint, but which does not answer all the paragraphs of the complaint, is bad. *Keller et al. v. Boatman*, 104
4. *Departure.*—A departure in pleading is when a party quits or departs from the case or defence which he has first made and has recourse to another. *Kimberlin et al. v. Carter*, 111
5. *Same.*—Where to a complaint upon a promissory note an answer is filed setting up a failure of consideration, a reply that there had been differences in reference to the consideration, but that they had been compromised and settled, by the defendant agreeing to pay, and the plaintiff to receive, a certain sum, less than the face of the note, is not a departure. *Ib.*
6. *Railroad.—Contributory Negligence.*—A complaint against a railroad company for negligently killing cattle must negative the existence of contributory negligence on the part of the plaintiff. *The T., W. & W. R. W. Co. v. Harris*, 119
7. *Same.*—A complaint against a railroad company for killing cattle, on the ground of the road's not being fenced, which alleges that the cattle came upon the road at a point where it was not securely fenced, and were there injured by being run over, etc., is sufficient. *Ib.*
8. *Fraud.—Presumption.*—An answer alleging that certain notes and a mortgage sued on were obtained by false and fraudulent representations in reference to the title of real estate for which they were given but con-

taining no averment of failure of title, is bad. In the absence of any averment to the contrary, the title will be presumed to be good.

Mahoney et ux. v. Robbins, 146

9. *Title.—Promissory Note.*—In a suit upon a promissory note given for the purchase-money of land, an answer setting up a failure of title, without showing breach of covenant or fraud, is bad on demurrer. *Ib.*
10. *Filing Copy.*—In pleading failure of title in an action on a promissory note given for real estate, where no fraud is pleaded, a copy of the deed must be filed with the answer. *Ib.*
11. *Exhibits.*—Where the averments of a pleading are contradicted by an exhibit referred to in such pleading, the exhibit will control.
Daily et al. v. The City of Columbus, 169
12. *Contract.—Common Carrier.*—In a complaint against a railroad company for a breach of a contract to furnish, at a certain time and place, the necessary cars, and to transport a certain number of hogs, it is not necessary to allege that the defendant, at the time complained of, had the ability to transport or to furnish the means to transport said hogs.
The P., C. & St. L. R. W. Co. v. Hays et al., 207
13. *Demurrer to Complaint does not go to Damages.—Damages.*—In an action for the breach of a contract by defendant, whereby, it is alleged, plaintiff suffered damages in the loss of advantage he otherwise would have realized from other contracts made by him, a demurrer to the complaint, wherein the contract between plaintiff and defendant and the breach thereof by defendant are averred, does not raise the question of the liability of defendant for consequential damages, by reason of the loss of such advantage suffered by plaintiff. The contract with defendant and its breach by him being alleged, the amount of damages is not to be decided by demurrer.
The Western Un. Tel. Co. v. Hopkins, 223
14. *Copy of Written Instrument.—Demurrer.—Statute of Frauds.*—Under the code, in an action upon a contract which is not alleged to be in writing, and the original or a copy of which is not filed with the complaint, the presumption is, that the contract is not in writing; and if the contract is such as is, by the statute, required to be in writing, the objection may be taken by demurrer. *Ib.*
15. *Same.—Contract.—Action On.—Telegraph Despatch.—Evidence.*—In an action against a telegraph company for failure to transmit a despatch, by reason of which the plaintiff lost the advantage of certain contracts made by him with other parties, the action is not founded on such contracts, but on the contract of the company to send and deliver the despatch; therefore said contracts with other parties may be proved, under the allegations of the complaint, to have been in writing. *Ib.*
16. *Suit on Appeal Bond.*—A complaint against the surety on a bond for an appeal to the Supreme Court, which does not show when the judgment appealed from was affirmed by the Supreme Court, or when the opinion and judgment of affirmance were filed in the office of the clerk of the lower court, is bad on demurrer.
Railsback v. Greve et al., 271
17. *Argumentative General Denial.*—The sustaining of a demurrer to a paragraph of answer which is merely an argumentative denial, the general denial being also pleaded, is not an available error.
Holmes v. The Phoenix Mut. Life Ins. Co. et al., 356
18. *Written Instrument.*—Where copies of records or written instruments which are not the foundation of a suit or defence, but which may be evidence on the trial, are set out and filed with the pleadings, such copies or the originals cannot be examined for the purpose of aiding or invalidating the pleading.
Armstrong v. McLaughlin, 370
19. *Written Instrument.*—In an action to set aside a deed and have it declared void, on the ground of fraud or undue influence in procuring its execu-

tion, or unsoundness of mind of the grantor, the deed is not the foundation of the suit, and need not be made a part of the complaint.

Jagers et al. v. Jagers, 428

20. *Correction of Written Instrument*.—A pleading asking the correction of a written instrument must show that there was fraud or mistake in its execution.

Comer et ux. v. Himes et al., 482

21. *Same*.—A complaint in such case, for the correction of a deed, which simply alleges that one estate was agreed for and another conveyed, is insufficient.

Ib.

POLICE OFFICER.

Powers of.—Presumption.—When it is shown that a policeman has been duly appointed by the proper authority of a city, whose charter confers on the common council the power to establish, organize, and maintain a city watch, and prescribe the duties thereof, and to regulate the general police of the city, it will be presumed, in the absence of evidence as to the power given to such policeman by the city ordinances, that he possesses the ordinary powers of peace officers at common law.

Dearing v. The State, 56

PRACTICE.

See AMENDMENT; BILL OF EXCEPTIONS; CONTINUANCE; CRIMINAL LAW, 1, 7, 8; DEMURRER; DEMURRER TO EVIDENCE; NEW TRIAL; REPLEVIN, 1; REVIEW OF JUDGMENT; SUPREME COURT; SURETY OF THE PEACE.

1. *Motion to Strike Out*.—It is not error to sustain a motion to strike out a paragraph of an answer that is no more than an argumentative denial, there remaining a paragraph of general denial.

The W. U. Tel. Co. v. Meek, 53

2. *Appeal from Justice's Court.—Pleading in Appellate Court*.—Where an action commenced before a justice of the peace is taken by appeal to a higher court, the defendant is not injured, nor will a judgment be reversed, by reason of the court's sustaining a demurrer to good paragraphs of an answer, if the matters set up in the answers are provable under the general issue.

Lingenfelter et al. v. Simon et al., 82

3. *Misjoinder*.—A claim for the delivery of personal property ought not to be joined with a paragraph for money paid, but a judgment cannot be reversed for such misjoinder.

Keller et al. v. Boatman, 104

4. *Same*.—Where no demurrer is filed to such complaint, but issues are formed on each paragraph, and trial had, each should be governed by the rules of law peculiar to itself; and where error intervenes under either paragraph and not under the other, the judgment, when it is capable of separation, should be affirmed in part and reversed in part.

Ib.

5. *Striking out Pleading.—Bill of Exceptions*.—A pleading struck out by order of the court cannot be made a part of the record, except by a bill of exceptions.

The Grover and Baker S. M. Co. v. Barnes, 136

6. *Special Finding Without Request*.—A special finding of facts by the court with conclusions of law upon them, made without request of either of the parties, must be regarded merely as a general finding.

Ib.

7. *Judgment.—Relief from*.—By section 99 of the code of practice, as amended by the act of March 4th, 1867, it is made the imperative duty of the court, where application is made within the statutory period, to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect.

Cavanaugh, Adm'r, v. The T., W. & W. R. W. Co., 149

8. *Same*.—An action was dismissed on call, because of the absence of the plaintiff and his attorney. It was afterward shown that the attorney

had been misinformed as to the time at which the cause was set for trial, and was therefore absent, and that the failure of the plaintiff and his witnesses to be present was caused by a delay of several hours of a railroad train, on which he depended for conveyance to the place where the court was sitting.

Held, that this was a case of excusable neglect, and that the plaintiff was entitled to have the judgment of dismissal set aside. *Ib.*

9. *Same.—Imposing Conditions.*—In granting relief under this statute, the court may impose conditions, but they must be reasonable. To require, as a condition of relief, that the plaintiff shall pay all the costs in the case, including the costs taxable against the defendant for failing to perfect a change of venue, and the costs of a continuance asked by the defendant, for which judgment had been previously rendered in the plaintiff's favor, and also the costs of various continuances had by agreement of the parties, was unreasonable. *Ib.*
10. *Same.*—It would have been reasonable to require the plaintiff to pay the costs occasioned by his excusable neglect, and to render judgment therefor, but it was not competent for the court to make the actual payment of such costs a condition of granting relief. (DOWNEY, J., dissented.) *Ib.*
11. *Relief from Judgment Taken by Default.—Affidavits.*—In an application, under the last clause of amended section 99 of the code (3 Ind. Stat. 373), to be relieved from a judgment taken by default, the party applying for relief must show that he has a meritorious defence or cause of action, as the case may be, and this should be supported by his affidavit; and on this point counter affidavits will not be received; but in respect to the grounds on which relief is asked, evidence will be heard on both sides. *Lake et al. v. Jones et al.*, 297
12. *Same.*—Such application may be by motion or complaint, and may be tried upon affidavits, depositions, or oral testimony, and if made during the term, no notice is required; if after the term, notice should be given. An answer is not necessary in such case. *Ib.*
13. *Same.—Pleading.*—A complaint to set aside a judgment rendered by default, on the ground of fraud, where the only fraud alleged is, that the plaintiff commenced the action when there was nothing due him, is bad. *Ib.*
14. *Same.*—A party against whom a judgment by default has been rendered must seek relief under the last clause of section 99 of the code. *Ib.*
15. *Same.—Excusable Neglect.*—A failure to appear to an action on an account, when summoned, induced by a belief that the action was based on a note given by the defendant to the plaintiff, to which he had no defence, will not constitute excusable neglect, for which a default can be set aside. *Ib.*
16. *Special and General Finding.*—A finding which purports to be special, but which is not made at the request of any of the parties, can only be regarded as a general finding. *Holmes v. The Phoenix Mut. Life Ins. Co. et al.*, 356
17. *Venire de Novo.*—That the court did not find its conclusions of law upon the facts found, is no reason for awarding a *venire de novo*. *Ib.*
18. *Supreme Court.—Special Finding.*—Where a special finding of facts and conclusions of law is made by the court, the party excepting to the conclusions of law need not move for judgment on the special finding, in order to present the questions arising thereon to the Supreme Court. *Lacy v. Weaver*, 373
19. *Cause Tried on Complaint Containing both Good and Bad Paragraphs.*—Where a cause has been tried on issues joined upon a complaint con-

taining two or more paragraphs, some defective and others good, a demurrer to the former having been overruled, and the record not showing that the cause was tried and the judgment rendered exclusively upon the good paragraphs, the judgment will be reversed for error in overruling the demurrers to the defective paragraphs.

Schafer et al. v. The State, ex rel. Cox, 460

20. *Striking Out*.—Striking out a part of a pleading is not error, if the part which is left is sufficient to present the cause of action or defence.

Humphreys v. Stevens et al., 491

PRINCIPAL AND AGENT.

See EVIDENCE, 7.

1. *Authority of Agent*.—*Evidence*.—Before one can be affected by the acts and declarations of another as his agent, the agency must be proved; and where the question is as to the extent of the agent's powers, it must first be shown that they extended to the acts or declarations in question.

Coon v. Gurley, 199

2. *Agent for Sale of Real Estate*.—*Right to Commission*.—Where the owner of real estate agreed with a real estate broker that he would pay him a certain amount if he would find a purchaser within a reasonable time, who would pay a certain price for his real estate, if within such time the broker procured such purchaser, he was entitled to recover his commission, though the owner of the real estate sold the same before the broker found the purchaser.

Lane v. Albright, 275

PRINCIPAL AND SURETY.

See EXECUTOR AND ADMINISTRATOR, 4, 5; PROMISSORY NOTE, 6.

1. *Payment by Surety*.—When a surety pays a debt, he must be legally bound for it, to enable him to recover the amount paid of the principal, and the principal must also, at the same time, be under a legal obligation to pay the debt.

Hollinsbee v. Ritchey, 261

2. *Same*.—*Surety on Replevin Bond*.—*Voluntary Payment by Surety*.—In an action of replevin, where a bond is filed and possession of the property obtained, and afterward the suit is dismissed by agreement of the parties, the plaintiff agreeing to pay the defendant a certain sum, but where no judgment is rendered, if the surety on the replevin bond afterward, without the request of the plaintiff, pay the amount agreed to be paid to the defendant, he can not recover the same of his principal, the payment being voluntary on the part of the surety.

Ib.

3. *Fairness to Surety*.—*Duty of Surety*.—As a rule of law, strict integrity and complete fairness are due from the creditors of a debtor to one who is about to become surety for such debtor; but this rule will not excuse the person about to become surety from reasonable attention to the circumstances under which he is called upon and reasonable diligence to inform himself as to the prudence of the act he is about to do.

Stedman et al. v. Boone, 469

4. *Same*.—If a person who is asked to become surety for another is put upon his guard by the circumstances surrounding the party for whom he is asked to become surety, and can ascertain from the persons present all the facts necessary to shield himself from fraud, he should make the inquiry.

Ib.

5. *Same*.—Fraud must not be induced by the person who complains of it, nor must he suffer himself to become an indolent victim.

Ib.

6. *Same*.—*Right of Surety to Rescind for Fraud*.—If a person is induced by fraud to become the surety of a debtor, and by the act he takes the property of the debtor from the reach of his creditors by ordinary pro-

cess of law, he must, upon discovery of the fraud, at once rescind, if he would relieve himself. *Ib.*

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

1. *Special Deposit*.—A. delivered to B. a certain sum of money, on an express agreement that it was to be placed by B. in the hands of the clerk of the circuit court as a special deposit for the use of C., and for the sole purpose of redeeming certain land sold to C. under a decree of foreclosure against B., and that the ownership of the money was not to pass from A. unless it was used in such redemption, in which case A. was to have a mortgage on the land. The money was accordingly tendered to C., who refused to accept it, and it was then placed in the hands of said clerk for said purpose. In a proceeding supplementary to execution brought by D., an execution creditor of B., against B. and said clerk, to subject said money still in the clerk's hands to D.'s execution, it did not appear what right B. had to redeem, or whether such right had been judicially determined.

Held, that until B.'s right of redemption should be determined, the money could not be taken from the clerk to be applied upon D.'s execution.

Terry v. Deitz et al., 293

2. *Same*.—A. advanced a certain sum of money to B., to be used for the redemption of certain land which had been purchased by C. on execution, it being expressly stipulated between A. and B. that the ownership of the money should remain in A., unless it should be received by C. in redemption of the land, there being some dispute as to the right of B. to redeem. The money was placed in the hands of the clerk of the court in which the judgment had been rendered on which the land was sold. If the money should be used in redemption of the land, B. was to repay A., if B. should sell the land; if he should not sell it, B. was to give A. a mortgage on the land redeemed, to secure the repayment of the money. If the money should not be so used, A. was to withdraw it. Proceeding supplementary to execution by D., a judgment creditor of B., against B. and said clerk, to subject to D.'s judgment said money in the hands of the clerk, C. having refused to receive it, and the right to redeem, so far as appeared, not having been settled.

Held, that the money remained the property of A., and could not be subjected to D.'s judgment. *The Brookville Nat'l Bank v. Deitz et al.*, 598

PROCESS.

See ALIMONY.

PROMISSORY NOTE.

See EVIDENCE, 2; PAYMENT, 1.

1. *Signing Blank*.—*Notice of Non-Payment*.—For the accommodation of A., B. signed his name with A. on the face of a promissory note payable in bank, a blank being left for the name of the payee. A. stated to B. that he expected to discount the note at the bank where payable, and that the names of the bankers could be inserted at the bank; but no restriction was imposed by B. as to the person to whom the note should be made payable. The note was not discounted by the bank, but was negotiated by A. to C., and the name of C. was inserted by A. as the payee.

Held, that B. was liable on the note to C.

Held, also, that as B. was a maker, and not an indorser, he was not entitled to notice of non-payment. *Wilson v. Kinsey*, 35

2. *Pleading*.—A complaint on a promissory note need not aver that the note is due, if the note is filed as a part of the complaint, and shows upon its face that it is due. *Green et al. v. Louthain*, 139

3. *Same.*—A complaint on a promissory note is fatally defective, if it fails to aver that the note sued on is unpaid. *Ib.*
4. *Negotiable Note.—Protest.*—It is not necessary to protest for non-payment a negotiable note payable at a bank in this State. Notice of a demand and of non-payment is all that is required to hold the indorser. *Ib.*
5. *Same.—Defences to.*—A promissory note negotiable by the law merchant, if assigned after maturity, is subject in the hands of the assignee to all defences that could be made to an ordinary non-negotiable note. *Ib.*
6. *Principal and Surety.—Burden of Proof.*—A promissory note signed by two persons, who are partners in business, in form as makers, was indorsed by a third person, not a member of said firm, at the request of one of said makers, in the absence of the other, with whom said indorser had no communication on the subject, it not appearing that said absent maker had any knowledge of said indorsement, and said indorser believing that both of said partners were makers, and intending himself, in placing his name on the back of the note, to become their indorser.
Held, that, as between said absent maker and said third person, the presumption from the form of the note was, that the former was a maker and the latter an indorser, and the burden of proof was on the former to show that he was a co-surety with the latter.
Held, also, that the facts shown did not establish a different relation between the parties from that to be presumed from the form of the note.
Schulz v. Klenk, 212
7. *Pleading.*—In a complaint upon a promissory note payable "at the First National Bank of New Albany," it is not necessary to allege that New Albany is in this State, and that the bank named is located there.
Glenn v. Porter, 500
8. *Same.—Commercial Paper.—Negligence of Maker.*—In an action on a promissory note, payable in a bank in this State, brought by an innocent indorsee for value before maturity, an answer by the maker alleging that two strangers came to the maker and asked him to sign a paper which they said was a "letter of agency," and he signed it, and it turned out to be commercial paper, where it is not alleged that he could not read, shows negligence on the part of the maker, and is not good. *Ib.*
9. *Same.—Want of Consideration.*—Want of consideration is not a good answer to a suit by an innocent indorsee, for value, before maturity, of commercial paper. *Ib.*
10. *Same.—Evidence.*—Where a general denial is answered to a complaint on a note alleged to have been indorsed in writing to the plaintiff, the indorsement must be read in evidence. *Ib.*
11. *Transfer by Endorsement.—Requisites of.*—In order to transfer a promissory note so as to enable the holder to sue the maker thereon without making the assignor a party, the transfer must be made by endorsement, so as to vest the legal title in the endorsee.
Keller v. Williams, 504
12. *Same.—Meaning of Endorsement.*—The word "endorsement" implies a transfer by a writing upon the instrument transferred. *Ib.*
13. *Same.—Pleading.*—In a suit upon a promissory note by the holder, where it is alleged that the note was assigned in writing by the payee, the inference is that the assignment was by a separate instrument, and such averment is not equivalent to an averment that the payee endorsed the note to the holder. *Ib.*
14. *Same.*—Where an endorsee sues the maker of a note, he need not set out a copy of the endorsement, but it is necessary to show by averment how he acquired the note, whether by endorsement or otherwise. *Ib.*

RAILROAD.

See COMMON CARRIER, 1; NEGLIGENCE; PLEADING, 6, 7; STREET; TAX, 1, 2.

1. *Constitutional Law.—Legislative Power.—Appropriation of Aid, by Counties and Townships, to Construction of Railroads.*—The statute authorizing aid to the construction of railroads by counties and townships taking stock in, and making donations to, railroad companies (3 Ind. Stat. 389) is constitutional. BIDDLE, J., dissented, on the grounds, 1. That the taking effect of the law is made to depend on a majority of the local vote of a county or township; 2. That the act is local and special; 3. That the act takes the private property of the citizen against his consent, without the consent of his representative, and without compensation; 4. That the tax authorized by the act is not equal and uniform; 5. That the State can not tax particular localities to build a railroad owned as private property. *Petty et al. v. Myers, Treas., et al.*, 1

2. *Appropriation of Aid to Construction of Railroad.—Petition for.—Order of Board of Commissioners for Vote on.—Where Expended.—Mode of Need not be Stated.—Construction of Railroad.—Tax.*—Upon the petition of freeholders of a township to the board of county commissioners, setting forth that a certain railroad company was duly organized, that the line of the railroad of the company ran through the township, and the construction of the railroad would be of great benefit to the township, and praying an appropriation of a certain sum of money, not exceeding two per cent. of the taxable property of the township, to aid in the construction of the railroad, the said board ordered an election for the purpose of taking the votes of the legal voters of the township upon the subject of appropriating said sum by said township to aid in the construction of said railroad; and, upon the election, so ordered, resulting in favor of the appropriation, the board, at the session at which it determined the amount to be charged for county purposes for the year 1873, ordered that a tax be levied, of a certain per cent., to be collected on all the taxable property of the township, in all respects as other taxes are collected for state and county purposes.

Held, that the intention being manifest to raise the money before the subscription or donation should be made, the action of the board was not in violation of sec. 6, article 10, of the constitution, prohibiting subscriptions unless the same be paid for at the time.

Held, also, that it sufficiently appeared by the petition that the aid was to be given for the construction of the railroad in that township. *Query*, whether money given by a township in aid of the construction of a railroad must be expended upon that part of the road lying in that township.

Held, also, that, although the road was already constructed through the township and the cars were running thereon, if the road was not thoroughly ballasted, and it did not appear that the full amount of aid proposed was not required to complete the road through the township, the question was not raised whether or not the aid was authorized for the construction of the road in the township.

Held, also, that the prayer of the petition was in conformity with the statute requiring the vote "to be taken upon the subject of appropriating money by such county or by such township for the purpose of aiding in the construction of such railroad as prayed for in said petition;" and that the mode of the appropriation of the money, by subscription or by donation, need not be specified in the petition or the order of the board, or be submitted to vote.

Held, also, that the intention was sufficiently expressed to levy the tax for the year 1873. *Ib.*

3. *Same.—Payment of Amount of Tax to Company After it has been Enjoined.*—Where the collection of a tax levied in a township in aid of the con-

struction of a railroad had been enjoined, some of the persons taxed having voluntarily paid to the railroad company the amount assessed against them, and taken from the company stipulations that they should be released from an equal amount that might thereafter be levied against them;

Held, that a tax thereafter levied upon new proceedings was not thereby vitiated as against persons who did not so pay to the company; and that the company had no legal right to the money thus paid, as the stock had not been subscribed for or the donation made. *Ib.*

4. *Injury to Child.—Negligence of Parents.*—It is negligence in a parent to permit a child between three and four years of age to be upon a railroad track where trains are frequently passing; and if the child be killed by a train of cars, the parent cannot recover damages therefor, unless such killing be done purposely or wilfully.

The J., M. & I. R. R. Co. v. Bowen, 154

5. *Killing Animal.—Pleading.—Fence.*—In a complaint, under the statute, against a railroad company for the value of hogs killed by a passing train, it is not sufficient to allege, in regard to the fence, "that said railroad was not, at the time and place where said animals were killed, fenced in by said defendant in manner and form as in the statute provided."

The P., C. & St. L. R. W. Co. v. Keller, 211

REAL PROPERTY, ACTION TO RECOVER.

See STREET.

REFORMATION OF INSTRUMENT.

See PLEADING, 20, 21.

1. *Reformation of Note After Judgment.*—After judgment upon a promissory note, it cannot be reformed. *Heavenridge v. Mondy et al.*, 434
2. *Mistake.*—To entitle a party to the reformation of a written instrument, it must be clearly and satisfactorily shown that there was a mistake of fact, and not of law. It must be shown that words were inserted which were intended to be left out, or that words were omitted which were intended to be inserted. *Ib.*
3. *Same.*—A mistake as to the legal effect of words inserted designedly in a written instrument gives no right to a reformation of such instrument. *Ib.*

RELATOR.

See COUNTY TREASURER, 3.

1. *Amendment.*—A judgment in the name of a wrong relator cannot be affirmed on the ground that the complaint might have been amended by inserting the name of a new relator. *Taggart et al. v. The State, ex rel. Jackson T'p*, 42
2. *Official Bond.—County Treasurer.*—An action on the official bond of a county treasurer, for a failure to pay over as required by law money in his hands as treasurer belonging to a township, should be prosecuted on the relation of the auditor of the county. *Taggart et al. v. The State, ex rel. Washington T'p*, 47
3. *Parties.*—The relator, where one is required, in an action on official bonds, must be the proper one, and he is the real party, while the State is a nominal party. *Neal et al. v. The State, ex rel. The B'd of Comm'rs of Brown Co. et al.*, 51
4. *Same.—Board of County Commissioners.—Auditor of County.—Treasurer.—Official Bond.—Action On.—Pleading.—Demurrer.*—The auditor, and not the board of commissioners of a county, is the proper relator in an action on the official bond of the county treasurer for a failure to pay

over funds belonging to the county in his hands as treasurer to his successor and for his conversion thereof to his own use, and a complaint in such action, on the relation of both the auditor and the board, as it does not state a cause of action in favor of all the parties who sue, is bad on demurrer for want of sufficient facts. *Ib.*

REPLEVIN.

See PRINCIPAL AND SURETY, 2.

1. *Special Finding*.—A special finding in these words: "We, the jury, find that the plaintiff had a right to replevy the mill," amounts to no more than a conclusion of law, which the jury could not decide, and will not authorize a judgment for the possession of the property.

Keller et al. v. Boatman, 104

2. *Chattel Mortgage*.—*Possession of Mortgaged Property*.—*Levy on Same*.—*Conclusiveness of Judgment in Replevin*.—Where mortgagees of personal property instituted an action of replevin against a sheriff, who had levied on the property, and the sheriff answered by a general denial, and also that he levied on the property by virtue of certain executions, and that it was at the time in the possession and the property of the execution defendants, and subject to the levy, and the record showed that after a demurrer was sustained to a reply of the mortgagees, the cause was "submitted to the court for trial as to the value of the property," and the court thereupon found the value, and that the defendant (the sheriff) was entitled to have the same returned to him, and, on failure to return, that he recover the value thereof, and assessed damages for the detention of the property, and rendered judgment on the finding; *Held*, that the case went to the court for a full trial of the issues, notwithstanding what the clerk said as to what was to be tried, and that such proceedings would conclude the mortgagees, in a suit against them on the replevin bond by the sheriff and the execution plaintiffs, as well as in a suit by such mortgagees against the sheriff and the execution plaintiffs, claiming the property and the proceeds of it under their mortgage, as to the title, right of possession, and value of the mortgaged property, and all remedy to enforce their rights under the mortgage, as against the sheriff and the execution plaintiffs.

Landers et al. v. George et al., 309

3. *Action on Replevin Bond*.—Where the court in an action of replevin finds in favor of the defendant, that he is entitled to a return of the property, and finds its value, and renders judgment for the return and, on failure to return, for the value of the property, this will give the defendant a right of action on the replevin bond for the amount of damage to him, not exceeding the value of the property not returned. *Ib.*

4. *Landlord and Tenant*.—*Rent Payable in Grain*.—Where a tenant agreed to give his landlord one-half of the wheat raised on the leased premises, to be delivered to the landlord in the bushel, on the premises, at threshing time, and the tenant only set apart and delivered one-third of the wheat, and retained the remainder under a claim of ownership, without separating the remainder of the landlord's share from his own, replevin would not lie for the landlord to recover the remaining portion of his half.

Lacy v. Weaver, 373

REVIEW OF JUDGMENT.

1. *Interest on Judgment*.—A judgment by default rendered on a promissory note bearing ten per cent. interest, when by the statute interest on judgments could not exceed six per cent., provided that the judgment should bear ten per cent. interest until paid.

Held, that a complaint to review such judgment would lie, because of such provision therein.

Davidson v. King et al., 338

2. *Pleading.—Sheriff's Return.*—In a proceeding to review a judgment on a promissory note and decree of foreclosure of a mortgage given to secure it, the sheriff's return upon the order of sale under such decree is not a part of the complaint, though a copy thereof be filed with it. *Ib.*
3. *Attorney's Fee.—Pleading.*—Where a complaint on a promissory note does not contain an averment of an amount claimed and reasonably due as attorneys' fees, but the note filed with the complaint stipulates for the payment of attorneys' fees if suit should be instituted thereon, and the sum for which judgment is demanded is large enough to cover the judgment rendered, the judgment taken by default will not be reviewed, because it allows an amount for attorneys' fees. *Ib.*
4. *Complaint for Review.*—A complaint for a review of a judgment, on account of matter discovered since the trial, must show that the plaintiff could not, by the use of reasonable diligence, have discovered the alleged new matter before the former trial. *Comer et ux. v. Himes et al.*, 482

ROBBERY.

See CRIMINAL LAW, 11.

SALE.

1. *Executory Contract.*—A contract for the sale of a certain number of good, corn-fed hogs, to average a certain weight gross, to be weighed at one place and delivered at another, at or within a certain time in the future, and to be then paid for at a certain price per hundred pounds, the hogs being a lot at the time of the contract being fed by the seller, and including some to be thereafter received of another person, where the hogs were never weighed or delivered to the buyer, did not pass the title in the hogs to the purchaser. *Lester v. East*, 588
2. *Same.*—In an executory agreement for a sale, the goods remain the property of the seller till the contract is executed. *Ib.*
3. *Same.*—In the case of an executory agreement, the buyer does not become the owner of the goods, cannot claim them specifically, and they are not at his risk, and his remedy on the contract, if there be a breach of it, is confined to an action for damages. *Ib.*
4. *Executed Contract.*—In a bargain and sale, the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, without regard to the fact whether the goods are delivered to the buyer or remain in possession of the seller. *Ib.*
5. *Same.*—In the case of a sale, the buyer can claim the goods specifically, and they are at his risk. *Ib.*
6. *Same.*—Whether a contract is a bargain and sale or an executory agreement for a sale, depends upon the intention of the parties, to be gathered from all the terms and stipulations of the contract, and is generally a question of fact. *Ib.*
7. *Same.*—A sale of personal property may be complete, so as to pass the title, without a delivery. *Ib.*

SET-OFF.

See HUSBAND AND WIFE, 1.

1. *Judgment Against Judgment.*—A judgment in one court may be set off against a judgment in another court. *Heavenridge v. Mondy et al.*, 434
2. *Same.*—Against a judgment obtained by the trustee of an express trust may be set off a judgment against the person for whom the trust is held. *Ib.*

SPECIAL FINDING.

See PRACTICE, 6, 16.

STATUTE OF FRAUDS.

See PLEADING, 14, 15.

1. *Parol Agreement to Change Mortgage.*—A parol agreement between a mortgagor and mortgagee and a third person that an indemnifying mortgage of real estate held by the mortgagee should be changed by inserting therein a provision that such third person should also be indemnified, as surety for the mortgagor, was equivalent to an agreement to execute a new mortgage, and was within the statute of frauds, and could not be enforced by such third person. *Irwin, Adm'r, et al. v. Hubbard*, 350
2. *Same.—Part Performance.—Fraud.*—The fact that such third person, in consideration of the promise to so change the mortgage, signed a bond as surety for the mortgagor, was not such a part performance of the agreement, nor was the refusal on the part of the mortgagor to change the mortgage such a fraud, as to take the case out of the statute of frauds. *Ib.*

STREET.

See TOWN, 4, 5.

Railroad.—Action to Recover Real Property.—An action for the recovery of the possession of real estate may be maintained against a railroad company occupying such real estate, being a street in a city, by virtue of a grant from the city council.

Sharpe et al. v. The St. L. & S. W. R. W. Co., 296

SUPERIOR COURT.

See JURISDICTION, 1.

Assignment of Error.—The Supreme Court cannot, on an appeal from a superior court, review any question which has not been raised by the assignment of errors in the general term of the lower court on the rulings at the special term. *Russell et al. v. Harrison*, 97

SUPREME COURT.

See NEW TRIAL, 4; PRACTICE, 3, 4, 18; SUPERIOR COURT.

Transcript must be Filed within Three Years. See LONG v. EMERY, 200.

1. *Evidence.*—Where a judgment is reversed upon the evidence, the Supreme Court must have a clear legal conviction that the action of the court below was erroneous. *Lewis et al. v. Ingle et al.*, 27
2. *Presumption.—Evidence.*—Where material evidence has been improperly admitted, it will be presumed that it influenced the finding, unless the contrary clearly appear. *Baker v. Dessauer*, 28
3. *Assignment of Error.*—Where the only error assigned is the overruling of a motion for a new trial, an alleged error in ruling upon a motion to suppress a deposition, not made a ground of the motion for a new trial, is not presented. *McMullen et al. v. Clark*, 77
4. *Errors not Pointed Out.*—It is not the duty of the Supreme Court to examine a record in search of errors that are not pointed out. *Brunner et al. v. Brennan*, 98
5. *Notice of Appeal to Co-Parties.*—Persons who have been made parties defendants in a complaint, to answer as to their interest in the subject-matter of the action, who have not appeared in the lower court, and against whom no judgment has been rendered, and who therefore cannot be affected by the judgment of the Supreme Court in such action, should not be served with notice of appeal, under section 551 of the code; and if they be made parties and notified, their names will be struck from the assignment of errors, and the costs occasioned by their being

- made parties in the Supreme Court, and by their being notified, will be against the appellants. *Keller et al. v. Boatman*, 101
6. *Demurrer*.—The Supreme Court will not reverse a judgment for sustaining a demurrer to a good paragraph of a complaint when all the evidence admissible thereunder might have been introduced under a remaining paragraph of the complaint.
The Grover & Baker S. M. Co. v. Barnes, 136
7. *Same.—Exception*.—Where the record does not show an exception to the overruling of a demurrer, no question on such ruling can be presented to the Supreme Court. *Ib.*
8. *Damages.—Nominal*.—A judgment will not be reversed for failure to assess nominal damages. *Mahoney et ux. v. Robbins*, 146
9. *Form of Decree.—Waiver*.—An objection to the form of a decree cannot be made for the first time in the Supreme Court. *Ib.*
10. *Rule of Decision*.—Where, after allowing for all presumptions in favor of a verdict and of the rulings of the court below, it clearly appears that the verdict is not supported by the evidence, the judgment will be reversed. *The J., M. & I. R. R. Co. v. Bowen*, 154
11. *Certificate of Clerk to Transcript*.—The certificate of the clerk to a transcript, on appeal to the Supreme Court, which only certifies that the transcript contains a true and correct copy of the judgment and decree, is insufficient. *Reid et al. v. Houston*, 181
12. *Alteration of Transcript*.—Where, on appeal to the Supreme Court, alterations have been made in a bill of exceptions and the transcript of the record by counsel for the appellant before they were signed, without any wrongful purpose, the appeal will not, because of such alterations, be dismissed, but the parties will be left to the usual methods of correcting the record. *Montgomery et al. v. Gorrell et al.*, 230
13. *Instrument Lost or Taken from Files*.—Where a written instrument which should constitute part of the record cannot be found, so as to be copied into a transcript for appeal to the Supreme Court, a supposed duplicate thereof should not be substituted without the consent of the appellee or his attorney, but proper proceedings should be instituted to compel the production of the original, or to prove its contents and thus make it a part of the record. *Ib.*
14. *Assignment of Error*.—An assignment of error in rendering judgment for a defendant, and against the plaintiff, presents no question to the Supreme Court. *Holmes v. The Phoenix Mut. Life Ins. Co. et al.*, 356
15. *Weight of Evidence and Credibility of Witness for the Jury*.—A court or jury trying a cause hear the testimony of witnesses from the living voice, with whatever peculiar accent, emphasis, or intonation it may have, and see the witness, his countenance, looks, expression of face, manner, readiness or reluctance, and the many nameless indices of truth or falsehood, which it is impossible to put into words; and when the verdict of a jury has received the approval of the court below, and the sole question is the weight of evidence, though the testimony may be contradictory, and not completely satisfactory, the Supreme Court will not disturb the verdict. *Cox v. The State*, 568

SURETY OF THE PEACE.

See MALICIOUS PROSECUTION, 5.

1. *Practice.—Judgment*.—In a proceeding for surety of the peace, the parties agreed, in the circuit court, that the cause should be dismissed, at the costs of the defendant, without any trial of the issue or finding or verdict thereon.
- Held*, that the court could not order the defendant to stand committed until the costs should be paid or replevied.

The State, ex rel. Schmalts, v. Kiesel, 205

2. *Diligence of Person Instituting Prosecution upon Information.*—Where a prosecution for surety of the peace is commenced upon information, the person instituting it should use such diligence as a reasonably prudent man would use under the circumstances to ascertain the truth of his suspicions, but he is not required to go to the person from whom he apprehends violence and inquire what are his intentions.
Fisher v. Hamilton, 341

SURPRISE.

Evidence.—A party cannot claim that he has been surprised by evidence that has been legally and properly given under the issues formed in a cause. He must be held to know what evidence may be given under the issues formed, and must be prepared to meet it.
Chamberlain et al. v. Reid, 332

TAX.

See COUNTY TREASURER, 1, 4; EXECUTOR AND ADMINISTRATOR, 2; GUARDIAN AND WARD, 1; JURISDICTION, 1, 2; RAILROAD, 1, 2, 3; TOWN, 2.

1. *Taxation of Railroad Property.—Appeal from Assessment.*—The act in reference to the valuation and taxation of railroad property within this State (3 Ind. Stat. 418) does not provide for any action by the district board of equalization upon the assessment made by the appraisers; and the only appeal authorized is an appeal from the action of the appraisers to the state board of equalization.
The J., M. & I. R. R. Co. v. McQueen, 64
2. *Same.—Stay of Proceedings.*—Such appeal does not vacate the valuation and assessment made by the county assessors, or suspend proceedings thereon.
Ib.
3. *Same.—State Board of Equalization of 1869 Illegal.*—The state board of equalization for the year 1869 was illegal in its organization; and had it been legally organized, it had no power to act after the time during which it might legally remain in session.
Ib.
4. *Purchaser of Land Belonging to Congressional Township Fund.*—Prior to the passage of the act of December 21st, 1872, Acts 1872, p. 57, the purchaser of land belonging to the congressional township fund was not, under the sixth clause of section 6, 1 G. & H. 70, liable for taxes assessed upon said land before it had been conveyed to him.
Willey v. Koons, Treas., 272

TELEGRAPH.

See EVIDENCE, 8; PLEADING, 15.

1. *Pleading.—Contract.*—In a suit under the statute, against a telegraph company, for damages arising from a failure to transmit a message correctly, if the complaint shows that the plaintiff engaged the defendant, and the defendant undertook to transmit the message, the mutual obligation of the parties is sufficient to maintain the action, though it be not alleged that anything was paid for the transmission of the message.
The W. U. Tel. Co. v. Meek, 53
2. *Regulations.—Statutory Obligations.*—A telegraph company cannot, by its own regulations in reference to repeating messages, etc., absolve itself from responsibility, under the terms of the statute, for special damages for negligence. 1 G. & H. 611, sec. 2.
Ib.
3. *Negligence.*—Nor can such company be exculpated from damages by showing that its line of telegraph was in good order, that approved instruments were used, and that faithful and competent servants were employed, if the particular act complained of shows negligence in the performance of duty.
Ib.

4. *Same.*—*What will Constitute Negligence.*—Where the terms of a message sent by telegraph are seriously changed, and the name of the sender entirely disfigured, either by the transmission or copying, it will import negligence on its face. *Ib.*

TENDER.

1. *Conditional Tender.*—A tender of payment made by the maker of a promissory note, on condition that the holder will dismiss an action against the maker in no way connected with the note, is bad. *Rose et al. v. Duncan et al.*, 269
2. *Of Part.*—A tender of payment of less than the amount due is bad. *Ib.*

TOWN.

1. *Trustees, how Elected.*—A trustee must be elected for each district of an incorporated town, but each must be elected by the voters of the whole town, at one poll or place of voting, and the preceding board of trustees, or a majority of them, must act as the inspectors at the election, and the certificates of election must be signed by the trustees present at the election who have acted as inspectors. *Millikin et al. v. The Town of Bloomington*, 62
2. *Same.*—*Tax.*—A tax levied by the trustees of a town, to be valid, must be levied by a legally constituted board of trustees, upon property liable to be taxed, and those acting as trustees must each reside in his proper district, and be legally qualified; and the necessary forms in assessing the property, levying the tax, and placing it on the duplicate, must be complied with. *Ib.*
3. *Same.*—*Defects Cured.*—The act approved March 9th, 1875 (Acts 1875, Reg. Ses., p. 153), cured the irregularities in the election of trustees and in the levy of the taxes complained of in this case. *Ib.*
4. *Power of Trustees.*—*Sidewalk.*—*Grade.*—The board of trustees of a town are authorized to establish the grades of streets, and to require the owners of lots, in constructing sidewalks to make them conform thereto, without any petition on the part of property holders. *Burr v. The Town of Newcastle*, 322
5. *Certainty of Ordinance.*—An ordinance establishing the grades of certain streets in a town is not void for uncertainty, if the grades so established can be ascertained without difficulty. *Ib.*

TOWNSHIP TRUSTEE.

See OFFICE AND OFFICER, 1, 2, 3.

TRUST AND TRUSTEE.

See ESTOPPEL, 1; SET-OFF, 2.

TURNPIKE.

See JUDGMENT, 1.

1. *Tolls.*—*Contract.*—A complaint to recover tolls for passing over a turnpike alleged a contract between the defendant and one W., the secretary and treasurer of the plaintiff, by which the defendant agreed to pay the tolls monthly. *Held*, that the complaint was insufficient. It should have averred a contract with the company, or shown that W. was authorized by the board of directors to make such contract, or that some consideration passed from W. to support the promise made to him. *The N. A., L. & C. Plank Road Co. v. Lewis*, 161
2. *Same.*—*Implied Promise.*—An action on an implied promise will lie to recover legal tolls for the use of a turnpike. The company is not

restricted to a suit for the penalty provided by statute for passing a toll-gate without paying toll. *Ib.*

3. *Failure to List Lands.—Injunction.*—An injunction will lie to prevent the collection of an assessment against the land of the plaintiff, to aid in the construction of a turnpike, under the act of 1867, if the assessors have failed to list any lands within the limits prescribed by the statute, although the lands not listed will not be benefited and nothing can be assessed against them.

The Muncie, etc., Co. v. Keesling et al., 184

USE AND OCCUPATION.

1. *Landlord and Tenant.—Action for Use and Occupation.*—A suit for use and occupation of real estate can only be sustained where the relation of landlord and tenant exists expressly or by implication.
Nance v. Alexander, 516
2. *Same.*—Evidence showing that real estate was taken possession of under a claim of purchase at a constable's sale, and by force, will not support an action for use and occupation. *Ib.*

VENDOR AND PURCHASER.

See PLEADING, 8, 9, 10.

Possession.—Where a deed of conveyance of real estate has been made and accepted, and possession taken under it, want of title will not enable the purchaser to resist payment of the purchase-money, or to recover more than nominal damages on his covenants, while he retains the deed and possession, and has been subjected to no expense or inconvenience on account of defect of title.

Mahoney et ux. v. Robbins, 146

VENIRE DE NOVO.

See PRACTICE, 17.

VOLUNTARY ASSOCIATION.

See CORPORATION.

WAIVER.

See AMENDMENT, 1.

WATER POWER.

See LANDLORD AND TENANT.

WATER WORKS.

See CITY, 1, 2.

WIDOW.

See DECEDENTS' ESTATES, 1, 3; HUSBAND AND WIFE, 2, 4; WILL, 1.

WILL.

1. *Will.—Widow.—Election by.*—Under the statute of this State (1 G. & H. 299, sec. 41), if a provision made by will for the widow of the testator is declared to be in lieu of her right in her husband's lands, she must elect whether she will take under the will. If the will makes provision for her in lands or money, or anything else, and it is not expressed to be in lieu of her right in the lands of her husband, and it does not clearly appear by the will to have been the intention of the testator that she should have both, she must in such case elect whether she will take under the will.
Young et al. v. Pickens et al., 23

2. Devise in Satisfaction of Obligation to Convey.—A father, owning certain real estate with a site for a water mill thereon, formed a contract of partnership with his son A., by which a mill was to be erected and A. was to become the owner of one-half of the mill and mill-site, and the contract was executed in all respects, except that the father died without conveying one-half of the mill-site to A., but left a will, by which he gave one-half of the mill and mill-site to A. and the tract of real estate on which the mill-site was located to his widow for life, and after her death to his son B., excepting in each of the latter devises one-half of the mill-site before devised to A.

Held, that the testator intended the devise to his son A. as a satisfaction of his obligation to convey to him one-half of the mill-site; and he could not claim the whole, one-half by contract and the other half by devise. *Green v. Green*, 417

WITNESS.

See EVIDENCE, 9.

Costs.—Number of Witnesses.—The Supreme Court will not presume, from the mere fact that seven witnesses were subpoenaed to prove a person's habit of intoxication, material to the issue, that the process of the court was abused. *Fromer v. The State*, 580

WORD.

"*Testimony.*" See INSTRUCTIONS TO JURY, 4.

END OF VOLUME XLIX.

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